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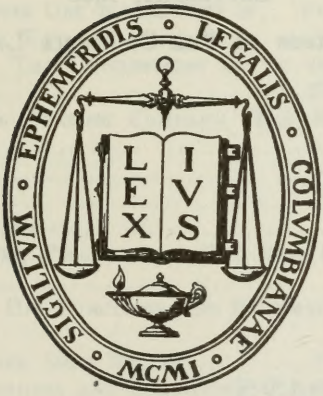

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THE EARLY HISTORY OF INSURANCE LAW.

It seems so highly improbable that the practice of insurance, now deemed indispensable to the safe conduct of commerce on sea or land, should have been unknown to the Phœnicians, Rhodians, Romans and other ancient commercial peoples, that scholars have subjected ancient writings to the closest scrutiny in the effort to find in them some evidence that insurances were made in early times. The result has been the discovery of accounts of certain transactions which bear such a resemblance to insurance as to have led not a few scholars to the conclusion that insurances were known to the ancients, although the business of underwriting commercial risks was probably not highly developed. Foremost among these writers championing the ancient origin of insurance is Emérigon, whose brilliant and learned *Traité des Assurances*, first published in 1783, is still read with respect and admiration by all students of the subject, and cited as authority in the courts of all civilized countries. In this country the same view has been advocated by Justice Duer, whose discriminating and scholarly Lectures on Marine Insurance were published in 1845, and there are not wanting recent text-writers to reach the same conclusion.[1] The contention that insurance was known to the ancients rests mainly upon certain passages found in the histories of Livy and Suetonius and in the letters of Cicero. Livy tells us that the contractors who undertook to transport provisions and military stores to the troops in Spain stipulated that the government should assume all risk of loss by reason of perils of the sea or capture.[2] In the second passage from Livy,[3] which gives in detail an account

[1] *E. g.*, Joyce on Insurance (1897), Vol. I, p. 14.

[2] Livy, lib. 23, c. 49. "* * * *ut quæ in naves imposuissent ab hostium tempestatisve vi publico periculo essent.*"

[3] Livy, lib. 25, c. 3.

of the extensive frauds practiced by one Postumius upon the country during the Second Punic War by falsely alleging that his vessels, engaged in the public service, had been wrecked, or by making false returns of the lading of old hulks that were purposely wrecked, it seems to be taken as a matter of course that the government was liable to make good such losses.

Suetonius, in his life of Claudius, states that that emperor, in order to encourage the importation of corn, assumed the risk of loss that might befall the corn merchants through perils of the sea.[4] This passage alone was sufficient to convince Malynes that Claudius "did bring in this most laudible custom of assurances." [5]

Likewise many writers have thought that Cicero refers to a transaction of commercial insurance when he writer to Caninius Sallust, proquæstor, that in his opinion sureties should be procured for any public moneys sent from Loadicea, in order that both he and the government should be protected from the risks of transportation.[6] These passages of doubtful significance when read in connection with the well-known fact that the rules of general average, and bottomry and respondentia loans, transactions closely related to insurance, were familiar to the ancients,[7] have been considered by these writers adequate evidence that insurance was at least known to the commercial peoples of the ancient world.

On the other hand, a great number of writers on insurance

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[4] Suetonius, lib. 5, c. 18. *"Nam et negotiatoribus certa lucra proposuit, suscepto in se damno, si cui quid per tempestates accidisset, et naves mercaturæ causa, fabricantibus magna commoda constituit."*

[5] Malynes, Lex Mercatoria, (1st ed., 1622) 146.

[6] Cicero, Epist. ad Fam., lib. II, Epist. 17. *"Laodiceæ me prædes accepturum arbitror omnis pecuniæ publicæ, ut et mihi et populo cautum sit sine vecturæ periculo."* But the course suggested by Cicero can hardly have been in general use, for, according to Plutarch, when Cato the Younger wished, about the same time, to transport a large sum of public money from Cyprus to Rome he adopted the following curious device to prevent its loss at sea. The money was placed in a large number of small casks, to each of which was attached by means of a long rope, a large block of cork. By this means, we are told, the money was carried to Rome with very little loss.

[7] See Moldenhauer, Das Versicherungswesen, p. 9; Walford, Encyclopædia of Insurance, Vol. I, p. 333. In the speech against Lakritos attributed to Demosthenes, but now thought to have been written by some other Athenian advocate about 341 B. C., there is set forth a bottomry bond which contains provisions for general average contribution, and other terms strikingly like those of a modern bottomry bond. For the provisions of the Roman Law governing maritime loans, see *De nautico fenore*, Dig. xxii, 2; Code, iv, 33.

consider that these passages refer to other transactions than insurance, and conclude that insurance was wholly unknown among the ancients. Among these are Grotius [8] and Bynkershoek [9] on the Continent, and Park,[10] Marshall and Hopkins in England.

This conflict of opinion as to the practice of insurance among the ancients is due largely to the fact that some writers restrict the significance of the term "insurance" more narrowly than others. The fact that we find no trace of the insurance contract in the laws of Rome or of any of the other ancient peoples, indicates unquestionably that if the contract of insurance, as known in modern times, was known to the ancients at all, its practical use was so little developed as to have made it insignificant. But if the term "insurance" be given a broader significance and made to include any kind of conventional arrangement by which one or more persons assume the risk of perils to which others are exposed—that is, an arrangement for aiding the unfortunate—then it is equally unquestionable that insurance is as old as human society itself. Friendly societies organized for the purpose, among others, of extending aid to their unfortunate members from a fund made up of contributions from all, are as old as recorded history. They undoubtedly existed in China and India in the earliest times.[11] Among the Greeks these societies, known as *Eranoi* and *Thiasoi*, are known to have existed as early as the third century before Christ.[12] These Grecian societies were largely religious and ritualistic, but among their chief functions, we learn, was that of providing for the expense of fitting burial for members. Similar societies, called *Collegia*, existed in Rome, where their establishment was attributed to Numa. These also performed many of the functions of benefit insurance societies, providing succor for the sick and aged members, and burial for

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[8] Grotius, De Jure Belli et Pacis, ii, 12, 3, 5.

[9] Bynkershoek, Quæst, Juris Pub. i, 21. *"Adeo tamen ille contractus olim fuit incognitus, ut nec nomen ejus, nec rem ipsam in jure Romano deprehendus."*

[10] System of the Law of Marine Insurances (1786). This most careful and learned work by Sir James A. Park (afterward Mr. Justice Park of the Common Pleas) is the first orderly treatment in English of the law of insurance. It reflects much of the spirit and genius of Lord Mansfield, with whose whole judicial career the author was personally familiar. (See especially his summary of the argument against the ancient origin of insurance at p. lxi, 8th ed.).

[11] Walford, Encyc. Ins., Vol. IV, p. 380.

[12] Walford, *ibid.;* Martin Saint-Léon, Histoire des Corporations de Metiers, p. 23 *et seq.*

those deceased.[13] These Roman *Collegia* fell into disfavor under the emperors, but nevertheless continued to exist, with restricted functions and influence, up to the time of the fall of the Empire, and it is probable that their existence was continued in spite of the disorder due to the numerous invasions of Italy until they reappeared in history as the mediæval guilds.[14] Of this, however, there is no documentary proof. It is certain that the guilds, which throughout Europe became so numerous and influential from the eleventh to the eighteenth centuries, possessed very many of the characteristics of the modern mutual benefit association, and, as such, carried on a primitive kind of insurance against the misfortunes incident to sickness and old age.[15]

In England, these guilds existed among the Saxons before the Conquest. We learn that among the purposes of these Saxon guilds was to provide for any member who had had occasion to

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[13] Martin Saint-Léon, Histoire des Corporations de Metiers, p. 24.

At Lanuvium, an ancient Latin town about nine miles distant from Rome, there has been found a marble bearing an inscription which sets forth the constitution and regulations of one of these friendly societies in the time of the Emperor Hadrian (A. D. 117-138). Parts of this inscription are thus translated:

"An Association (*collegium*) constituted under the provisions of a decree of the Roman Senate and People, to the honor of Diana and Antinous, by which decree the privilege is granted of meeting, assembling and acting collectively.

"Anyone desiring to pay a monthly subscription for funeral rites may attend the meetings of the Association; but persons are not allowed, under the color of this Association, to meet more than once a month, and that only for the purpose of contributing for the sepulture of the dead.

"Ye who are desirous of becoming new members of this Association, first read through its laws carefully, and so enter it as not afterwards to complain, or to leave a subject of dispute to your heirs.

"It is absolutely required by the Association that anyone wishing to enter, shall pay an entrance-fee of one hundred sesterces, give an amphora of good wine, and pay as monthly dues five asses.

"Item; It is resolved that whoever shall have omitted to pay his dues for ——— consecutive months, should the fate of humanity befall him, there shall be no claim on the society for his funeral rites, even though he shall have made a will.

"Item; It is resolved that upon the death of any member of this Association who has paid his dues, three hundred sesterces shall be appropriated out of the treasury for him: of which sum fifty sesterces shall be distributed at the burning of the corpse. The funeral procession shall be on foot.

"Item; It is resolved that no funeral rites shall be had by him who, from whatsoever cause, has inflicted death on himself.

"Item; It is resolved that when any member of this Association shall be made free, he shall contribute an amphora of good wine."

For the complete inscription see Kenrick's Roman Sepulchral Inscriptions. Also Hopkins' Manual of Marine Insurance, p. 8.

[14] Palgrave's Dict. of Political Economy, Vol. II, p. 209.

[15] See in general Brentano, The History and Development of English Guilds.

take the life of anyone, the *wergeld*, or indemnity that, under the Saxon law, was payable to the family of the person slain.[16] It seems that these guilds, in addition to providing, by contribution of the members, aid for the sick and burial of the dead among their number, also furnished indemnity to those who had suffered loss by fire.[17] After the Conquest, the English guilds became numerous and influential. Of one of these, the Guild of St. Katherine, Aldersgate, we learn that the brethren assisted any member if he "falle in poverte, or be aneantised thorw elde or thorw fyr oder water, theves or syknesse."[18] Thus we perceive that what are now termed sick benefit insurance and burial insurance have existed from time immemorial, and that, while many of the benevolences of these fraternal associations were charitable merely, yet there is to be found in their history distinct evidence of contractual insurance, and even of mutual fire insurance.

In like manner there may be included under the broad definition of insurance given above agreements made by governments, whether through the medium of enactments or through private contract, in accordance with which indemnity is provided for those who suffer loss from peculiar perils. Such just and proper provisions for the protection of the citizen rendering service to the government are doubtless of great antiquity. As stated above, Livy speaks of the practice whereby the Roman Republic indemnified those engaged in transporting military supplies for losses suffered by perils of the sea or acts of the enemy, as one long established and unquestioned.[19] This undoubtedly was insurance in a limited sense. Indeed, we have evidence that a sort of government insurance was practiced in times much earlier than those of which Livy wrote. In the Code of Hamurrabi,[20] which must have been enacted at least as early as 2250 B. C., we find a provision that a city in which any man should be robbed of his property should be under obligation to indemnify him for his loss, while

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[16] Lambert, Two Thousand Years of Guild Life, p. 43 *et seq.* Palgrave's Dict. of Political Economy, Vol. II, p. 209.

It is not a very far cry from this savage Saxon form of blood insurance to its modern analogue, employer's liability insurance.

[17] Brentano, The History and Development of English Guilds, p. 11; Cheyney, Industrial and Social History of England, p. 72.

[18] Palgrave's Dict. of Political Economy, *ubi supra;* Brentano, The History and Development of English Guilds.

[19] Livy, lib. 23, c. 49; lib. 25, c. 3.

[20] §§ 23, 24.

if the city and governor permitted such disorder that a person lost his life, the family of the murdered man were entitled to be indemnified from the public treasury.

Furthermore, bottomry and respondentia bonds and the allowing of general average in case of shipwreck and the jettison of the goods of one or more of the joint adventurers, may well be included under the term insurance in its broadest significance, and these were unquestionably known and much used among the ancients, particularly among the Rhodians. The lender of money in bottomry who could claim the repayment of his loan only if the vessel upon whose bottom the loan was made completed the contemplated voyage in safety, was entitled, not merely to the current rate of interest on the money loaned, but also to an added sum which would compensate him for the risk he ran of losing his whole principal, and which, in reality, represented the premium paid upon the risk assumed. We therefore conclude that the principle of insurance, considered as an arrangement whereby a person subjected to any peril may be indemnified for loss on account of such peril, was known to the ancients and made use of by them to a very considerable extent; but that commercial insurance, as practiced so extensively in modern times, was either unknown to them or little used.

We are, therefore, safe in concluding that the use of insurance as an important element of commerce and social economy, has had its origin in relatively recent times, but we cannot with any accuracy fix the date of its beginning nor determine indisputably what city or country is entitled to the credit of having originated it. Some scholars have professed to discover evidence that commercial insurance was first developed in Portugal, while some others favor Spain and Flanders.[21] More recent research, however, made among the ancient records of the Chamber of Commerce of Florence has established satisfactorily that insurance had its origin in the great commercial cities of Northern Italy, where it must have been in common use among the merchants engaged in carrying on the large foreign trade of those cities as early as the beginning of the fourteenth century, and possibly

[21] See the statement of these conflicting claims in Il Contratto di Assecuratione nel Medio Evo, by Enrico Bensa, p. 42 *et seq.* Richards, in his Insurance (1892), states, without citing authority, that "a Chamber of Assurance was established in Bruges as early as 1310." This can scarcely be correct.

more than a century earlier.[22] Among the records of the Florentine Chamber of Commerce are the books of Francesco del Bene and Company, of Florence, which set forth commercial transactions dating from A. D. 1318. In these books are recorded the items of expense incident to trade in Flemish cloth and other articles. Among these items one frequently finds the cost of insuring the goods in transit.[23] From the character of the references to insurances thus made, we can readily infer that as early as 1318 the custom of making insurances upon goods subject to peril of transportation either on sea or land had become a customary incident of traffic. This fact justifies the conclusion that among these Italian cities insurance had been in use many years before the date of the entry in these old Florentine books. The earliest policy of insurance now extant was made in Genoa in the year 1347. This quaint old document which, it will be observed, was in the form of a promise to repay a fictitious loan upon the happening of any misfortune to the vessel insured, is set forth in all of its barbarous Latin in the note below.[24] The first certain

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[22]Bensa, Il Contratto di Assecuratione nel Medio Evo, p. 48. There are unsupported statements to the effect that insurance was invented by the Jews to protect their goods during their flight into Italy after their expulsion from France in 1182, and that the Italian merchants learned it from these Jews. See Anderson's History of Commerce, Vol. I, p. 82. The story is inherently improbable. See Duer, Marine Ins., Vol. I, p. 33.

[23] Extracts from Books of Francesco Del Bene e Compagnia di Ferenze, taken from Bensa, Il Contratto di Assecuratione nel Medio Evo, p. 183:

*"Messer Lapo e Dosso de' Bardi e Compagne devno avere di XVIIII d'Aprile, anno mille trecento dicenove, per rischio di panni inscritti in qua che ci fecero nella fiera di Proino santaiuolo anno mille trecento diciotto condotti di Fiandra e di Brabante e di Champagnia e di Francia infino a Firenze a tutto loro rischio del costo e delle spese che ci hanno fatte suso * * *.*

*"i quali panni costarono con tutte ispese condotti in Pisa l. sei mila novecento quarantasette e s. diecenove d. tre a fiorini che montano a ragnone di lire otto s. quindici centenaio di rischio siccome ne fece patto e mercato, l. sei cento sette s. diecenove a fiorino. * * *"*

[24] *"In nomine D. Amen. Ego Georgius Lecavellum civis Janue confiteor tibi Bartholomeo Basso filio Bartholomei me habuisse et recepisse a te mutuo gratis et amore libras centum septem Janue. Renuncians exceptioni dicte pecunie ex dicta causa non habite, non recepte, non numerate et omni juri.*

"Quas libras centum septem Janue, vel totidem ejusdem monete pro ipsis, convenio et prometto tibi solemni stipulatione reddere et restituere tibi aut tuo certo nuncio per me vel meum nuncium.

"usque ad menses sex proxime venturos, salvo et reservato, et hoc sane intellecto, quod si cocha tuo de duabus copertis et uno timono, vocata S. Clara que nunc est in portu Janue parata, Deo dante, ire et navigare presentialiter ad Majorichas iverit et navigaverit recto viagio de portu Janue navigando usque ad Majorichas et ibi applicuerit sana et salva, quod tunc et eo casu sit præsens instrumentum cassum et nullius valoris ut si facta non fuisset. Suscipiens in me omnem risicum et periculum dicte

record of an insurance transaction at Bruges is of the year 1370, but the policy in question was evidently issued by a Genoese underwriter.[25] The earliest trustworthy evidence of the practice of insurance at Barcelona is found in certain ordinances of the City of Barcelona, published in 1435, which contain extensive provisions for the regulation of marine insurance.[26] The particularity of these regulations shows clearly that the practice of insurance had already become extensive and of much importance in the commercial life of the Catalonian city some time before the date mentioned, but it is hardly probable that it antedated the similar practice in the Italian cities, which, as we have seen, certainly existed considerably more than a century earlier than the date of the Barcelona ordinances. Another positive reason for thinking that insurance was of later development in Barcelona than in the Italian cities is found in the earliest extant edition of the *Consolat de Mar*, known to have been published at Barcelona in 1494. This celebrated collection of sea laws, which under its Italian name of *Consolato del Mare*, had for three centuries such wide currency throughout Europe, and which is generally believed to have been first published in Barcelona as early as the middle of the thirteenth century, contains no reference whatever to insurance.[27]

It has been generally believed that the contract of insurance was first used in underwriting marine risks, and it is indisputable that it had its earliest and most important development in connection with maritime interests. Nevertheless, it is interesting to ob-

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quantitatis pecunie quousque dicta cocha aplicuerit Majoricis, navigante recto viagio ut supra. Et etiam si dicta cocha fuerit sana et salva in aliqua parte, usque ad dictos sex menses, sit similiter præsens instrumentum cassum et nullius valoris, ac si factum non fuisset.

"In dictum modum et sub dictis conditionibus promitto tibi dictam solutionem facere, alioquin penam dupli dicte quantitatis pecunie tibi stipulanti dare et solvere promitto cum restitutione damnorum et expensarum que propterea fierent vel sustinerentur litis vel extra, ratis manentibus supra dictis et sub ypotheca et obligatione bonorum meorum, habitorum vel habendorum.

"Actum in Janue in Banchis in angulo domus Carli et Boniface Ususmaris fratrum, anno dom. Nat. MCCCXXXXVII indit. XV secundum cursum Janue die XXIII Octobris circa vesperas. Testes Nicolaus de Tacio draperius et Johannes de Recho, filius Bonanati cives Janue." [Printed in Bensa, Il Contratto di Assecuratione nel Medio Evo, p. 192.]

[25] Bensa, Il Contratto di Assecuratione nel Medio Evo, p. 48.

[26] See Walford, Encyc. Ins., Vol. I, p. 251, where these ordinances are set forth in part. Also Duer, Marine Ins., Vol. I, pp. 34, 35.

[27] There is an excellent brief history of the Consolato del Mare, by Sir Travers Twiss, in 9 Encyclopædia Britannica, 317, and of the other ancient sea laws by the same author in 21 Encyclopædia Britannica, 583.

serve from these ancient books of Francesco del Bene and Company, the Florentine merchants already referred to, that as early as 1318 insurances were customarily made against loss by reason of dangers incident to land transportation, as well as to that by sea, and that shipments of specie were also at that early day insured just as in modern times.[28]

The daring and adventurous merchants of the Italian cities carried on extensive commerce with all of civilized Europe, and during the fourteenth and fifteenth centuries their practice of insuring their ventures spread with their trade to every considerable trading town of the Continent and of England. The usages of insurance, therefore, readily took on the same international character that had already been impressed upon the other customs of traders engaged in international mercantile pursuits. The usages governing the older forms of commerce, especially maritime usages, had found expression in collections of regulations and ordinances of great antiquity, that came to possess the greatest authority throughout Europe rather by their general acceptance than by force of authoritative enactment. These "sea laws,"[29] as they were known, had their origin much earlier than the beginning of the practice of insuring ventures at sea, for otherwise they would not have been silent on so important an adjunct to successful commerce. But their existence undoubtedly greatly facilitated the rapid growth of a body of international insurance customs, which soon became incorporated with the greater body of commercial usages and became an integral part of the law merchant, having the same sanctions and enforced through the same procedure before conventional merchant courts.

As early as 1411 the business of making contracts of insurance had become of sufficient importance among the Venetians to attract legislative action, for on May 15th of that year we find that an ordinance was passed condemning and prohibiting the prevalent practice among Venetian brokers of underwriting foreign risks.

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[28] Bensa, Il Contratto di Assecuratione nel Medio Evo, p. 51. It is highly probable that the practice of insurance during the Middle Ages was not so narrowly confined to marine risks as is generally believed. Nicholas Magens, in his essay on Insurance, published at London, in 1755, at p. 267, gives a complete copy of a policy written at Hamburg in 1720, on the lives of certain cattle. Here we have our very modern live-stock insurance!

[29] The history of these sea laws is very uncertain. 21 Encyclopædia Britannica, 583. They are collected and translated in Malynes' Lex Mercatoria and Magens' Essay on Insurance, and in Cleirac's Les Us et Coustumes de la Mer, with extensive comments. They are easily accessible to American students in 30 Federal Cases, Appendix.

But it is evident that underwriters did not at that early day regard insurance regulations with any greater respect than do their successors of the present time, for in June, 1424, another ordinance again prohibited insurances upon foreign vessels or goods, the preamble carefully explaining that an added reason for not underwriting such risks lay in the fact that war was raging between the Genoese and the Florentines and Catalonians, on which account the Venetians should refrain from aiding any of the belligerents. After this insurance became a favorite subject for regulation, often of a very drastic character. From the texts of these ordinances it is evident that in Venice the business of underwriting early became localized, just as in London it was carried on in Lombard Street, for in these Venetian ordinances it was usually provided that they should be read at noon on the "Street of Insurances at the Rialto." [30]

In 1435 insurance ordinances, still extant, were published at Barcelona. As already stated, the edition of the *Consolat de Mar* published at Barcelona in 1494 contained no reference to insurance, nor did the Laws of Wisby or of the Hanse Towns, which, though of earlier origin, were published probably about this same time. It seems that these laws of the northern commercial cities were little more than adaptations of the much earlier laws of Oleron, which likewise make no mention of insurance. In 1647 there was published at Bordeaux Cleirac's *Us et Coustumes de la Mer*, which contained the text of the *Guidon de la Mer*. This famous treatise on sea laws, which was compiled by some unknown author of Rouen between the years 1556-1600, treated extensively of marine insurance. In 1681 the Marine Ordinances of Louis XIV were published. These ordinances, supposed to be largely the work of Colbert, Louis XIV's gifted Minister of Finance, provide for the regulation of the business of insurance with a completeness of detail that speaks clearly both of the importance of commercial insurance at that time and of the age and extent of the practice that could make such detail possible. Additional evidence of the important place assumed by insurance during the sixteenth century is found in the publication of treatises on insurance by Santerna[31] in 1552 and by Straccha[32] in 1569. The

[30] For a more complete account of the Venetian ordinances see Hopkins, Marine Ins., p. 20 *et seq.*

[31] "De Assecurationibus et Sponsionibus Mercatorum." Santerna was a distinguished Portuguese lawyer.

[32] "De Assecurationibus."

excellent treatise of Roccus, an eminent jurist of Naples, was not published until 1655, much later than the first English treatise by Gerard Malynes, which first appeared in 1622.

The introduction of the practice of insurance into England is shrouded in the same obscurity that envelops its origin on the Continent. Gerard Malynes, in his quaint treatise on the law merchant, published in 1622, asserts that policies of insurance were written in England at an earlier date than in the low countries, and that in fact Antwerp, then in the meridian of its glory, learned the practice of insurance from London. This conclusion he reached through the wording of the policies issued at Antwerp, which "do make mention that it shall be in all things concerning the said assurances as was accustomed to be done in Lombard Street, in London." Malynes' reasoning is far from convincing, and his conclusion is probably incorrect. It is highly probable, however, that the enterprising Lombards who had taken up their residence in London, in many cases as representatives of Italian trading houses, did not long delay in bringing to England the device of having their commercial ventures assured by underwriters which had proved so advantageous to the trade of their Italian associates. The activity of these London Lombards was so great as to give a name to Lombard Street,[33] where they dwelt and carried on business as pawn-brokers, goldsmiths and importers of foreign goods. That the introduction of insurance into England is to be attributed to Italians there resident is not only highly probable in itself, but is also supported by much circumstantial evidence. Thus one of the clauses of the modern Lloyds' policy provides that the policy "shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street." We know also that the earliest policies issued in London of which we have any certain knowledge were written in Italian with English translations attached.[34]

The first certain record of an insurance transaction in England is found in the report of the case of *Emerson* c. *De Sallanova*,[35] determined in a court of admiralty in 1545. Curiously enough the insurance involved in this proceeding was not against

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[33] Malynes explains the name of Lombard Street by saying that "certain Italians of Lombardy kept there a pawn-house or Lombard" [*cf.* our term "lumber-room"].

[34] See Selden Soc. Pub., Vol. XI, pp. 45-58, where several of these policies are given.

[35] Selden Soc. Pub., Vol. XI, p. lxvi.

the perils of the sea, as might have been expected, but against possible loss consequent upon the withdrawal by the King of France of a safe conduct. The oldest English policy extant, dated September 20, 1547, is set forth in both Italian and English in the report of *Broke* c. *Maynard,* an admiralty cause.[36] The copy of this policy is much mutilated, but a somewhat similar policy involved in *Cavalchant* c. *Maynard,* bearing date only a year later, is found in good condition among the records of the proceedings in admiralty. The English version of this venerable instrument is given in the note below.[37]

It is evident that prior to the time of Lord Mansfield's accession to the bench, the development of insurance law in England followed the same lines as that of the other branches of the law merchant. It was generally understood that the common law courts, which did not recognize the quasi-international customs of merchants, afforded no fit forum for the determination of causes between merchants. Hence all early insurance disputes must have been settled by conventional merchant courts or arbitrators, who, it seems, might be appointed, upon petition, by the Privy Council, the Lord Mayor of London, or by the Court of Admiralty. Thus, in the record of the proceedings before admiralty prior to 1570 we find a petition by the owner of insured goods asking that arbitrators be appointed and the underwriters made to pay, "and forasmuche as your said rater hath noe remedye by the ordre and course of the common lawes of the realme, and that the ordre of insurance is not grounded upon the lawes of the realme, but rather a civill and maritime cause to be determined and decided by civilians, or else in the highe courte of Admiraltye." [38]

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[36] Selden Soc. Pub., Vol. XI, p. 47.

[37] Selden Soc. Pub., Vol. XI, p. 46.

"In the name of God Amen the XXVIth daye of November, 1548. Thomas Cavalchant and John Gyralde and their company of London make themselves to be assured by the order and accompte of Pauli Ciciny of Messena or of eny other whatsoever they be upon the ship called the Sancta Maria de Porto Salvo patron Matalyno de Maryny or how soo ever better she were called or patronysed upon a hundrithe peaces carseys and fryseys or eny other wares laden or to be laden in Hampton untyll they be arryved in Messena and discharged on lande in good saufty. And the assurers be content that this wrytinge be of as much forse and strength as the best that ever was made or myghte be made in this Lombard strete of London according to the order and customes whereof every oon that assureth, as they that cause them to be assured or content to be bound. And God sende the good shipp in saufty."

[38] Selden Soc. Pub., Vol. XI, p. lxxvi.

There were evidently numerous disputes about the payment of insurances, and there were probably many cases in which the underwriters refused to perform the judgments of the merchant courts, whose great weakness lay in the lack of a sheriff, for in the admiralty records for the year 1570 is found a petition on behalf of certain foreign merchants who complained that they could not get their insurance paid. In the same year there was an application by an "Easterling" for the appointment of arbitrators "forasmuche as the matter consistethe muche upon the ordre and usage of merchantes by whom rather than by course of law yt may be forwarded and determyned." It is noteworthy that when the Court of Admiralty made the reference, the commission to hear the case ran to certain English and foreign merchants.[39]

The extracts just given from the admiralty records show that the inability of the conventional merchant courts to enforce their judgments compelled the merchants and underwriters to seek more formal and efficient tribunals before which to bring their causes. They first turned to the courts of admiralty, which easily assumed jurisdiction of maritime and foreign contracts of insurance, and readily took cognizance of the customs of merchants. But for some reason, not easily understood, the courts of admiralty did not prove satisfactory tribunals for the determination of insurance causes, and relatively few of such causes were brought before them.[40] Lord Coke's misleading report of *Crane* v. *Bell*,[41] a case decided in 1546, has been the source of several mistaken statements that the writ of prohibition granted in that case by a common law court took away from the admiralty courts all jurisdiction of insurance questions.[42] As a matter of fact, however, *Crane* v. *Bell* had nothing to do with insurance,[43] and we know that admiralty courts still heard insurance cases for nearly half a century after the date of that case.[44]

Whatever may have been the cause, it is clear that the admiralty judges contributed little to the development of insurance law, and that during the latter part of the sixteenth century litigants sometimes felt compelled to carry insurance causes to the

[39] *Ibid.* [40] *Id.*, Vol. XI, p. lxxx. [41] 4 Coke Inst., 139.

[42] *E. g.*, Bradley, J., in Insurance Co. *v.* Dunham (1870), 11 Wall. 1, 34.

[43] This is made perfectly clear by Selden Soc. Pub., Vol. VI, pp. lxviii, 129, 229.

[44] *E. g.*, Maye c. Hawkyns (1573), Selden Soc. Pub., Vol. XI, p. 149. In this case the insurer of goods taken by pirates was subrogated to the rights of the insured against Hawkyns, the doughty English admiral, who had recaptured the goods.

common law courts, in some cases even after they had been heard and determined by merchant courts. Lord Coke's report of *Dowdale's Case*[45] refers to an action brought in a common law court on an insurance policy in 1588. But manifestly the common law courts of that day, with their highly technical and tedious rules of procedure, as governed by precedents of agricultural rather than mercantile origin, were ill adapted for the settlement of merchants' disputes. Thus it appears that at the beginning of the seventeenth century persons having insurance causes were without a satisfactory tribunal for their determination. The conventional courts could not enforce their judgments, the courts of admiralty had proved inadequate, possibly because of the vexatious jealousy of the common law courts in unreasonably restricting their jurisdiction, while the common law courts were wholly unfit. The merchants and underwriters naturally sought relief from Parliament, and secured, in 1601, the first English insurance act,[46] "for the obtaining whereof," wrote Malynes,[47] "I have sundry times attended the committees of the said Parliament, by whose means the same was enacted not without some difficulty; because there was [*sic*] many suits in law by action of assumpsit before that time upon matters determined by the Commissioners for Assurances, who for want of power and authority could not compel contentious persons to perform their ordinances; and the party dying, the assumpsit was accounted void in law." The preamble of this act is exceedingly interesting, since it not only shows the great importance of the business of insurance at the time of its enactment, and a remarkably clear understanding of the real nature of insurance, but it also gives in striking summary the history of insurance law and practice during the preceding century, which necessitated the establishment of the court created by the act. This preamble, in part, is as follows:

"(2) And whereas it hath been time out of mind an usage amongst merchants, both of this realm and of foreign nations, when they make any great adventure, (especially into remote parts) to give some consideration of money to other persons (which commonly are in no small number) to have from them assurance made of their goods, merchandizes, ships and things adventured, or some part thereof, at such rates and in such sort

[45] 6 Coke's Rep., 46 b. The case referred to is believed to be the earliest common law insurance case of which any record was made.

[46] 43 Eliz., c. 12. [47] Lex Mercatoria, p. 106 (3rd ed., 1686).

as the parties assurers and the parties assured can agree, which course of dealing is commonly termed a policy of assurance; (3) by means of which policies of assurance it cometh to pass upon the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavily upon few, and rather upon them that adventure not than those that do adventure, whereby all merchants, especially of the younger sort, are allured to venture more willingly and more freely: (4) and whereas heretofore such assurers have used to stand so justly and precisely upon their credits, as few or no controversies have arisen thereupon, and if any have grown, the same have from time to time been ended and ordered by certain grave and discreet merchants appointed by the lord mayor of the city of London, as men by reason of their experience fittest to understand, and speedily to decide those causes, until of late years that divers persons have withdrawn themselves from that arbitrary course, and have sought to draw the parties assured to seek their monies of every several assurer, by suits commenced in Her Majesty's courts, to their great charges and delays."

By the provisions of this act authority was given to the Lord Chancellor or to the Lord Keeper of the Great Seal, to issue commissions directed to "the judge of the admiralty for the time being, the recorder of London for the time being, two doctors of the civil law, and two common lawyers, and eight grave and discreet merchants, or any five of them," with authority to hear and determine in a summary manner insurance causes. This court of insurance commissioners did not, however, prove successful, owing to the fact that its jurisdiction was confined to causes arising on policies issued in London, and construed not to extend to any other insurances than those on goods. The court was also held to be open only to the insured and not to the underwriter, and its judgments could not be pleaded in bar to a subsequent action at law.[48] We are not surprised, therefore, to learn that this special court lapsed into disuse, and died of inanition within a century after its creation.

The failure of this special court seems to have discouraged any further attempts to better an almost intolerable situation, for the hundred and fifty years intervening between the enactment of

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[48] For the history of the Court of Insurance Commissioners, see Cunningham, Law of Insurances (3rd ed., 1766) pp. 163-169. Also 3 Blackstone's Comm., 74, 75.

43 Eliz. and the appointment of Mansfield as Chief Justice of the Court of King's Bench are almost a barren waste as far as the history of the development of insurance law is concerned. The common law judges did not grow in wisdom or in the favor of those having insurance causes. The merchants and underwriters continued to submit their disputes to arbitrators and commissions, sedulously avoiding the common law courts. It is said that, all told, the reported insurance cases determined at law prior to Lord Mansfield's time did not exceed sixty in number,[49] nor among these can there be found one that clearly establishes a great principle or that can be fairly considered a leading case. So slight was the grasp of the common law judges of this period upon the nature and true function of the contract of insurance that as late as 1746 it was uncertain whether an insurable interest was necessary to support a policy,[50] although the fundamental principle requiring the presence of such an interest was perfectly well understood by the Continental authorities of an earlier time. In 1746, by Statute 19, Geo. II, c. 37, the making of policies without interest was prohibited, as was also the making of reinsurances, under the mistaken impression that they fell under condemnation as wager policies. During this period the doctrine of concealment was applied by the Court of King's Bench in *Seaman* v. *Fonereau*,[51] and the peculiar doctrine of warranties in insurance policies was foreshadowed, rather than definitely declared, in *Jeffery* v. *Legender*,[52] and in *Lethulier's Case*.[53] Add to these a few somewhat uncertain cases on the effect of deviation,[54] and we have practically the sum of the contributions made to insurance law by common law judges prior to Mansfield.

Lord Mansfield became Chief Justice of the Court of King's Bench in 1756, which may rightly be considered as the date of the beginning of the development of the modern law of insurance as a part of the common law system. This great judge, thanks to his more liberal Scottish training, was not so slavishly attached to common law precedents as to be unable to perceive the necessity of recognizing merchants' customs in determining rights under

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[49] Park, Marine Ins. (4th ed.) xliii.

[50] Compare Depaba *v.* Ludlow (1720) 1 Comyns 360, with Goddart *v.* Garrett (Chancery, 1692) 2 Vern. 269.

[51] (1743) 2 Strange 1183. [52] (1691) 3 Lev. 320.

[53] (1692) 2 Salk. 243.

[54] Green *v.* Young (1702) 2 Salk. 444; Foster *v.* Wilmer (1745) 2 Strange 1249; Elton *v.* Brogden (1746) 2 Strange 1264.

merchants' contracts, not so bigoted as to be unwilling to seek light from foreign sources. In insurance causes, as with causes involving other branches of the law merchant, he impanelled juries of merchants and underwriters, to establish customs and usages current among those who made insurances, and diligently consulted the time-honored maritime laws of the Continent, and the treatises of English and Continental writers.[55] Thus he not only gave prompt justice to litigants who appeared before him, and provided a fit tribunal for merchants, but he saw so clearly the fundamentals of the theory of insurance, and understood so well its practical applications to the needs of business and commerce, that the numerous doctrines that he laid down have survived all of the many changes in commercial conditions and methods that have since taken place, and almost without exception they apply as well to the commercial transactions of to-day as to those of Mansfield's own time. When he retired from the bench in 1788, he left a complete system of insurance law, as is so well shown by Sir James Park, a contemporary of Mansfield's, in his brilliant work on marine insurance. This system has been much extended in modern times, but it has been little changed, and still stands as a lasting monument to the great judge whom Mr. Justice Buller[56] rightly called "the founder of the commercial law of this country."

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[55] Thus, in Luke *v.* Lyde (1759), 2 Burr, 883, 889, he cites the Rhodian Laws, The Consolato del Mare, The Laws of Oleron and of Wisby, The Ordinances of Louis XIV, and the treatise of Roccus.

[56] In Lickbarrow *v.* Mason (1787), 2 T. R. 73.

THE LIABILITY OF THE INACTIVE CORPORATE DIRECTOR.

Whether the position of a corporate director be treated as analogous to that of an agent or to that of a trustee,[1] it seems to be assumed that a director's violation of duty or breach of trust, in either case, may be clearly defined and adequately redressed. Whether such breach consist of specific wrongdoing or of such conscious inaction as constitutes the variable error of "gross negligence," the liability of the director has been repeatedly recognized. Where, however, the conduct of the director involves no act which may in itself be deemed improper, and where there has been no such inaction as may be construed to be "gross negligence," a somewhat different problem arises. To what extent may a corporate director properly, or safely, permit the affairs of the corporation to be managed by his fellow directors without becoming in some degree liable, through his inaction, for any waste or other damage resulting from their improper conduct? To what extent may an inactive director be made liable for the wrongful conduct of his fellow directors in which he may not have participated, of which he may not even have had knowledge, and his connection with which arises simply from his membership upon the same board? These considerations suggest the inquiry whether the responsibility attaching to mere membership in a board of directors has been, as a matter of law, as clearly defined as the standards of business and of public policy require. The problem has been frequently adverted to, and while there may appear a disinclination to enlarge the liability of the inactive director, there nevertheless has resulted no precise or adequate rule of law. To attempt to state any such rule, as a matter of theory, may be impossible and certainly would be futile; but a consideration of the tendencies makes manifest the security of the passive director and the insignificance (certainly so far as the confidence of stockholders and the public arising from the *personnel* of any board may be concerned) of membership upon a board of directors, and may emphasize the amount of decision and dictum which will require revision if the legal character of the corporate director is to be made more nearly identical with the practical conception.

[1] Or as like that of "bailee of the capital." Gardiner *v.* Pollard (1863), 10 Bosw. 674, 691.

Briefly stated, the really passive director has been deemed not responsible for the wrongdoings of his associates, since his own liability arises only from his actual participation in such wrongdoing; and, further, while he may be liable for the wrongdoings of his associates, though not joining in them, if he has knowledge of such transactions and remains inactive, yet if he is ignorant of such transactions certainly liability does not rest upon him. The natural consequence was suggested to Stirling, J., in *In re Cardiff Savings Bank.*[2] "It was much pressed on me that, if this be so, all the trustees and managers might abstain from acting, leaving the business to be transacted by the officers of the bank alone, and yet escape liability." That may well seem the logical, and, for all practical purposes, the disastrous result; and the full import of the argument was brought out by the weak rejoinder of the Court (having held that one without knowledge could not be made liable for the neglect and omission of others) in saying: "I have difficulty in seeing how this could happen without the knowledge of some at least of the trustees and managers." This, of course, is reasoning in a judicial circle, unless such a director is under a specific obligation to keep himself informed as to corporate affairs, which is not yet the case,[3] or unless there may be imputed to such a director knowledge which he does not in fact possess, which also is not the case. The reality of the problem is thus apparent. A recent typical case, though diverging somewhat in its conclusion from the earlier orthodox theory, illustrates the practical phase of the question, in holding that a court should not ignore the rights of innocent parties who confided in the corporation, "relying upon the protection which the names of these directors and a proper discharge of their duties held out to the public," and in the novel opinion that "if a person becomes a confirmed invalid for a number of years and unable" thus (or, apparently, from any cause) "to attend to the duties of a director, he has no right to hold on to the position and at the same time decline its corresponding responsibilities."[4]

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[2] L. R., 1892, 2 Ch. Div., 100, 110.

[3] "This point, however, involves the question, whether a director is not bound to make himself acquainted with what his co-directors are doing, and to take such steps as may be in his power to prevent them from doing wrong. On this question opinions differ, and it can scarcely be considered as settled." Lindley, Law of Companies, 6th Ed. (1902), vol. i, p. 529.

[4] Rankin *v.* Cooper (1907), 149 Fed. Rep., 1010, 1015, 1016.

So far as the element of mere non-participation is concerned, one of the earliest decisions is that of *The Charitable Corporation* v. *Sutton*,[5] the complaint in which set up certain "actual breaches of trust," and secondly such "manifest breaches of trust, or at least of such supine and gross negligence of their duty, and so often repeated, that it will amount to a breach of trust." The latter gave rise to "an accumulated charge" against all the fifty directors involved, but even under such circumstances Lord Hardwicke held that only those were liable who were "conniving at the affair." The passive director thus incurred no liability because of the misdeeds of his associates. As was said in *Attorney-General* vs. *Wilson*,[6] "It is evident that Lord Hardwicke, in the case of *The Charitable Corporation*, considered that each defendant would be liable for each transaction in which he had been a party." Acting upon this interpretation, the Court, in this later case, gave relief only against "those members of the governing body who were instrumental in carrying into effect the acts complained of." The decree in *Evans* v. *Coventry*[7] was apparently framed on this theory so as to cover only those transactions in which the defendants had taken part, Lindley, L. J., taking this view when in a later case he remarked: "I have carefully looked at the decree in *Evans* v. *Coventry*, and I infer that the directors there held liable not only passed resolutions that were *ultra vires*, but also acted on them."[8] Following these precedents, Jessel, M. R., in *In re National Funds Assurance Company*,[9] directed that the order should be made "limiting of course the liability of each director to those sums which he participated in paying." Keeping within the limitation thus clearly established the Court in *Flitcroft's Case*[10] merely held directors liable "not only for what they put into their own pockets, but for what they in breach of trust pay to others," and in the same year the facts in *In re Anglo-French Co-operative Society*[11] were treated as involving "a simple paying away of this money * * * by the directors." The liquidator in *Grimwade* v. *Mutual Society*[12] accordingly

[5] (1742), 2 Atk., 400. [6] (1840), Cr. & Ph., 1, 28, 29.

[7] (1857), 8 D., M. & G., 835.

[8] Cullerne *v.* The London and Suburban G. P. B. Society (1890), L. R., 25 Q. B. Div., 485, 489.

[9] (1878), L. R., 10 Ch. Div., 118, 129.

[10] (1882), L. R., 21 Ch. Div., 519, 536.

[11] (1882), L. R., 21 Ch. Div., 492, 506.

[12] (1885), 52 L. T., 409, 415.

sought "to charge the directors with such only of the loan transactions as they personally took part in during their tenure of office." In *London Trust Co.* v. *Mackenzie*[13] the non-participating director was exempted, while in *Young* v. *Naval, Military and Civil Service Society*[14] it was held that a director, although present at the adoption of a resolution under which improper payments were made, was nevertheless held liable to refund, in addition to the amounts he had himself received, only the amount which he had, by signing the check, participated in diverting, and was not held liable with respect to amounts received by other directors under the same resolution and with his knowledge. This extreme of immunity seems to have been foreshadowed by the statement of Lindley, L. J., in *Cullerne* vs. *The London and Suburban G. P. B. Society:*[15] "The plaintiff ought not to have passed the resolutions, and his co-directors ought not to have acted on them. I am not aware of any authority which goes the length of deciding that under these circumstances the plaintiff is liable for what they have done. They were not his servants or agents; their authority was as great as his; their knowledge the same as his; and, even assuming that he misled them upon a point of law, this does not make him liable to the society for the loss of money which they advanced and not he." The rule has been briefly stated in *Fisher* v. *Graves,*[16] as follows: "At common law[17] one director does not seem to be liable for the misconduct of co-directors not participated in, as a wrongdoer, by him." The Court was controlled by the opinion expressed, with a perfectly consistent qualification, in *Briggs* v. *Spaulding,*[18] to the effect that directors "cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the

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[13] (1893), W. N., 9.

[14] L. R., 1905, 1 K. B., 687, 696.

[15] (1890), L. R., 25 Q. B. Div., 485, 489.

[16] (1897), 80 Fed. Rep., 590, 591.

[17] But the liability of a director under the national bank act has been held to be substantially the same as at common law. Clews *v.* Bardon (1888), 36 Fed. Rep., 617.

[18] (1890), 141 U. S., 132, 147. The correctness of this decision is questioned in Thompson, Corporations, sec. 4111; cf. Robinson *v.* Hall (1894), 63 Fed. Rep., 222, 227.

business with attention or in neglecting to use proper care in the appointment of agents."[19]

Thus there is found reiterated and controlling affirmance of the principle that the passive director is exempt from liability for the wrongful conduct of his associates, and indication in the same connection that the passive director, even when possessed of knowledge of the circumstances, may be regarded as equally free from liability. Certainly if the passive director is ignorant of the material circumstances his immunity is clearly recognized. This second proposition has been so repeatedly stated that it has become quite as much a fixed principle as has the proposition already illustrated.

In an opinion referred to above the Court said: "To hold that the Marquis was guilty of neglect or omission in respect of this duty, in the absence of any knowledge or notice that it was not duly performed, would, in my opinion, be to fix him with the liability for the neglect and omission of others rather than his own."[20] The "conniving" of Lord Hardwicke, also, would seem to involve knowledge as an essential element in determining liability, and it has been held that knowledge of, as well as participation in, the wrongful act "must be brought home to the person charged."[21] After referring to some of the more recent cases,[22] Vaughan Williams, J., said: "But in no one of those cases can I find that directors were held liable unless the payments were made either with actual knowledge that the funds of the company were being misappropriated or with knowledge of the facts that established the misappropriation."[23] The same principle, although applied to the acts of subordinates rather than of co-directors, has more recently been adopted by Halsbury,

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[19] Recognizing, or assuming the existence of, the principle, are: Ernest *v.* Croysdill (1860), 2 D., F. & J., 175, 193, 194; Cargill *v.* Bowers (1878), L. R., 10 Ch. Div., 502; *In re* Oxford Benefit Building & Investment Society (1886), L. R., 35 Ch. Div., 502; *Re* Liverpool Household Stores Association (1890), 62 L. T., 873, 879; *In re* Sharpe, L. R., 1892, 1 Ch. Div., 154, 169; *In re* Lands Allotment Company, L. R., 1894, 1 Ch. Div., 616.

[20] *In re* Cardiff Savings Bank, L. R. 1892, 2 Ch. Div., 100, 110.

[21] Arthur *v.* Griswold (1874), 55 N. Y., 400, 406.

[22] *In re* National Funds Assurance Company (1878), L. R., 10 Ch. Div., 118; Flitcroft's Case, L. R. (1882), 21 Ch. Div., 519; *In re* Oxford Benefit Building and Investment Society (1886), L. R., 35 Ch. Div., 502; Leeds Estate Building and Investment Company *v.* Shepherd (1887), L. R., 36 Ch. Div., 787; *In re* Faure Electric Accumulator Company (1888), L. R., 40 Ch. Div., 141.

[23] *In re* Kingston Cotton Mill Company, L. R., 1896, 1 Ch. Div., 331, 347.

L. C., in the statement that the charges "may be disposed of by the proposition that" he "was not himself conscious of any one of these things being done, and that unless he can be made responsible for not knowing these things, * * * the charges are not made out." [24] The general proposition as stated has been acted upon in other instances,[25] and is recognized by Lindley.[26]

Moreover, the passive director thus protected in his ignorance, is given a still more complete immunity by the application of the doctrine that there should not be imputed to such director "knowledge which he does not possess in fact." [27]

Advancing further into this field of irresponsibility the passive director may readily find justification in so far ignoring his duty as even not to attend the meetings of the board. Lord Hardwicke had this possibility in mind when he said: "To instance in non-attendance; if some persons are guilty of gross non-attendance and leave the management entirely to others, they may be guilty by this means of the breaches of trust that are committed by others." [28] But this dictum has been materially qualified. Thus, it has been admitted that one properly might attend at the board only occasionally,[29] and also that it "could not be expected that each member of so numerous a body should take a very active part in the management, or attend every meeting." [30] Similarly, Vice-Chancellor Bacon remarked: "He became a director . . . but he was not bound to attend every meeting of the directors. It is not part of the duty of a director to take part in every transaction which is conducted at a board meeting. His business or his pleasure may call him elsewhere, and it would be a most unheard of thing to say that if anything wrong were done at a board meeting, he being named among the directors but not present, he is

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[24] Dovey *v.* Cory, L. R., 1901, A. C., 477, 485; affirming *In re* National Bank of Wales, Limited, L. R., 1899, 2 Ch. Div., 629, 672.

[25] Joint Stock Discount Company *v.* Brown (1869), L. R., 8 Eq., 381, 401; *Re* Montrotier Asphalte Company (1876), 34 L. T. (N. S.), 716; cf. Spering's Appeal (1872), 71 Pa. St., 11, 21.

[26] Law of Companies, vol. i, pp. 528-530.

[27] Hallmarks Case (1878), L. R., 9 Ch. Div., 329, 332, 333; *In re* National Bank of Wales, Limited, L. R., 1899, 2 Ch. Div., 629, 644; Wakeman *v.* Dalley (1872), 51 N. Y., 27, 32; Rudd *v.* Robinson (1891), 126 N. Y., 113, 121; cf. Ashhurst v. Mason (1875), L. R., 20 Eq., 225.

[28] The Charitable Corporation *v.* Sutton (1742), 2 Atk., 400, 405.

[29] *In re* Forest of Dean Coal Mining Company (1878), L. R., 10 Ch. Div., 450.

[30] *In re* Cardiff Savings Bank, L. R., 1892, 2 Ch. Div., 100, 108.

liable for what is done in his absence." [31] Emphasizing this view it has even been said that a director who for four years abstained from executing any of the duties of his office might be held not liable.[32]

The assurance of the passive director may seem still more complete by reference to the proposition, which has been given some recognition, that a director is under no obligation to attempt to prevent or to undo the wrongful acts of his associates. Thus, it has been suggested that no precedent could be found for holding that a director, having knowledge of improper conduct on the part of his associates, could be under any liability because he did not interpose to prevent possible loss.[33] So far as a director may be supposed to be under any obligation to attempt to undo the improper acts of his associates, the point has been squarely met by Justice Lindley: "I am not aware of any authority which goes the length of saying that a director who is not a party to any misapplication of a company's funds is liable for not taking legal proceedings to upset the transaction after the thing is done, and I do not think it would be in accordance with the principles applicable to these cases if we were now first to make a precedent of that kind." [34]

The passive director thus has the advantage of safeguards so complete as to render his title inapt, and indeed also to make this description of him seem to be no more than mere fiction. The illusion is not dispelled by applying to his conduct the "supine negligence" test of Lord Hardwicke, or the more modern and equally indefinite "gross negligence" test, by which in many instances the real difficulty of the situation suggested is not met at all. Nor does the test that a director shall give to the affairs of the corporation such attention as a prudent man would give to his own affairs furnish any rule of action according to which difficulties of the nature here suggested may be solved. The latter test has served rather as a supplement to, or explanation of, the gross negligence test, being in itself quite inapplicable to modern corporate conditions. The gross negli-

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[31] *In re* Montrotier Asphalte Company (1876), 34 L. T., 716, 717.

[32] *In re* Denham & Co. (1883), L. R., 25 Ch. Div., 752; Cf. Warner *v.* Penoyer (1898), 91 Fed. Rep., 587, 594.

[33] Liquidator of the Caledonian H. S. Co. *v.* Curror's Trustee (1882), 9 C. of S., 1115, 1129, 1130.

[34] *In re* Lands Allotment Company, L. R., 1894, 1 Ch. Div., 616, 635; Cf. Movius *v.* Lee (1887), 30 Fed. Rep., 298.

gence test itself implies the existence of certain elements, as of knowledge, actual or imputed, of a duty and a conscious disregard of such, which make it also inapplicable to the typical case arising under circumstances such as have been described, while, naturally, the test applied in the fraud cases has no application here.

If, thus, the inactive director may leave undone all the things a trustee or an agent may leave undone and may take advantage of all the protection the law affords to persons acting in such other capacities, and at the same time may be under no duty to recognize any obligatory relation with respect to the conduct of his associates, it follows as a possible result, as here pointed out, or indeed as an inevitable result, that the real purposes for which directors are in fact chosen may be in large measure defeated. If, on the other hand, a directorship in itself means the assumption of any specific obligation other than the obligations one always is under with reference to one's personal conduct, then it would seem necessary that the attempt to apply to the director only such tests of propriety of conduct as are applied to the trustee and agent must fail and that there must be recognized in the position of a director some further element of responsibility which has not thus far been clearly developed. A dogma which earlier prevailed (strengthened, doubtless, by the circumstance that many corporations then were of the charitable type), and which has not yet disappeared, assumed that directors were rendering gratuitous service to stockholders and that accordingly there should be imposed upon the position of director as few obligations or hardships as possible, in order that men of the desired character would more readily accept election. If this idea proceeded from the supposition that it was desirable for the benefit of the stockholders or the corporation to secure as directors men of a peculiar qualification or standing, the stockholders on the other hand should be allowed to rely, in some degree at least, upon the effect of the same supposition. That reliance is frequently very real and of important consequences, but if such reliance is now to be entirely disregarded in determining the responsibility of directors, then the popular notion of the corporate director is not in harmony with the legal notion; and the only real question is whether the legal or the popular conception should prevail, whether really any desirable end is to be secured by adhering to the strict and perhaps inapplicable rules developed in the course of faltering attempts

to define the position and duty of a director. It may be said that this requires the substitution of a practical or ethical standard for an existing legal standard which, however fallacious, is certain; but such substitution is the normal method by which legal rules are often developed, and if in this instance the law cannot lend itself to such development, it fails of its purpose. That such modification of legal theory is necessary or proper need not now be urged, as the present purpose is merely to suggest the anomaly which has been allowed to persist.

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THE CANADIAN CONSTITUTION.

A self-governing community is one that governs itself. And a colony is one that does not. That sounds very clear. But what, then, is a self-governing colony? There cannot be such a thing? Oh, yes, there are many of them. Canada is one. But is Canada a colony? Yes, but the term in this connection needs explanation.

If you assume that a self-governing colony means one that really governs itself your assumption is wrong. A self-governing colony does not mean a colony that governs itself—much as you would wish all descriptive adjectives to describe accurately—any more than a free citizen means one that, absolutely, can do as he pleases. In the Colonial Office in Downing Street, there are two sets of files—one for colonies without legislatures, called Crown Colonies, and the other for colonies with legislatures, called self-governing colonies. These legislatures may be of any description—legislatures with little, less, least authority, or with much, more, most authority—that is quite immaterial. There are but two sets of colonies—one with and one without legislatures. Some are Crown Colonies, which means that Downing Street governs them, and the others are self-governing colonies, which means that they have some of the characteristics of a self-governing community.

But which, and how many of these characteristics has Canada? In 1792 the Provinces of Upper and Lower Canada (now Ontario and Quebec) were self-governing colonies—that is, they had legislatures, and (with the exception of three years in the lower province) they have been self-governing colonies ever since; but while in the early days the noun, "colony," pervaded all political arrangements, now the adjective, "self-governing," has almost completely squeezed the noun out of the phrase.

How this has happened is a long and most interesting story, one that very closely parallels English constitutional history, and American also down to 1776.

England is proud of her race of sovereigns, and particularly proud of the achievement of her political liberties. Paradoxically enough, however, it was as against these very sovereigns that England had to struggle for these very liberties; and it was only by beating her Kings (including the beheading of one and the dethroning of another) that any achievement at all was accom-

plished. England had made great progress by 1792. The Kings by that time had been fairly well defeated. The Ministers had ceased to be King's Ministers (mere favorites and appointees of the King) and had become (Pitt the first of them) Ministers of the people—responsible, not to the King but to the House of Commons, and removable by loss of a majority there.

One might have expected, then, that these long-fought-for and highly valued liberties would have naturally accompanied the establishment of local parliaments in all parts of the British Empire. They had been obtained by assertion of the rights of the people as against the alleged prerogatives of the Crown—the right, principally, of people to govern themselves as against the right of some one man (the son of his father) to govern them. This great right had at last been established and almost acknowledged when, in 1792, parliaments commenced in Upper and Lower Canada. But in Canada the British people set up those very "prerogatives of the Crown" which they had battered down in Britain; and steadily and persistently (even to the point of rebellion) they denied to Canadians the great political liberties which, with such noble assertion and indomitable resolution, they had obtained for themselves.

And so the historic struggle recommenced; the Governors in Canada playing the parts of the Kings in England; the people in Canada pursuing the same tactics and using the same arguments that had brought final victory to their fathers in England; the same lists of grievances, the same "humble" petitions for their removal; the same refusal of supplies until they were removed; the same rebellions, because redress could not be obtained otherwise; the same relief after the rebellions.

American colonial history was precisely the same, except that in 1775 rebellion was successful, while the Canadian *émentes* were easily put down. The natural evolution of a self-governing colony into self-government, was interrupted and ended in the case of the thirteen colonies. How far has it proceeded in Canada?

To understand the Canadian constitution, sharp distinction must be made between form and reality, between fiction and verity. Unskilled readers of English constitutional history are often led astray by the continued use of language that had long ago lost its meaning. On page after page one may read about the "prerogatives of the Crown" with respect to something or other—that the King does this and this—and students are abso-

lutely misled into imagining that the King really has the prerogative right to do it, and does it. Other parts of the book are, of course, quite inconsistent with that notion. The writer tells you that the King acts only on the advice of his Ministers (save in the rarest of cases); he ought to tell you that he usually does not act at all, and that his principal prerogative now is to do as he is told.

For example (to cite the King's highest "prerogative"), the British Parliament consists of three estates: King, Lords, and Commons. Nothing can become law without the assent of all three. According to constitutional lawyers, each estate has an equal right to veto the proposal of either of the others. But the King never exercises that right. His prerogative is gone. Queen Anne (200 years ago) was the last sovereign that exercised it. Nowadays the King follows the advice of his Ministers. If he refused to give his assent—well, he would soon cease to be King.

This distinction between fact and fiction pervades almost every relation between Canada and the United Kingdom.

Observe, for example, how the Canadian constitution was made. It was enacted, of course, by the British Parliament (1867); but where did its various provisions come from? All previous Canadian constitutions were drafted in the Colonial Office in London; were elaborately debated in Parliament; and their final form reflected the wisdom or unwisdom of the Houses there. Canadians were not consulted as to the earlier of the series. The general outline of the second to last of them was submitted to the old Provinces of Upper and Lower Canada for approval, but that was a new piece of deference, and no reference to the approval appeared in the statute. The recital was: "Whereas *it is necessary* that provision be made for the good government," etc.

The present constitution was drawn in Canada; was agreed to by Canadians; and was taken to London to be enacted,[1] and it recites:

"Whereas the Provinces of Canada, Nova Scotia and New Brunswick *have expressed their desire* to be federally united into one Dominion," etc.

That was in 1867. In 1900 the Australian Colonies agreed to federate, and the British statute creating the new Commonwealth recited:

[1] That some changes were made in Downing Street, and agreed to by the Canadian delegates there, does not affect the point above made.

"Whereas *the people* of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God *have agreed* to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and *under the constitution hereby established.*"

Not only so, but a clause in the statute provides:

"This constitution shall not be altered except in the following way:"

namely, by proposals adopted by the Federal parliament and ratified by popular vote. The American constitution, enacted, in reality as well as in form, for the American people, recited:

"We, the people of the United States * * * do *ordain, and establish* this constitution for the United States of America";

and all amendments of it derive from the same source. The Canadian and Australian constitutions while declared by the British Parliament, were really formed, not by the Colonial Office but by the colonials themselves; and the amendment of the Australian document is in the hands of the Australians.

The transition in Colonial constitution-making, therefore, from "colony" to "self-governing" is marked, interesting, and significant. In form the British Parliament still maintains its authority. In reality it has gone with the emigrants.

Legislative jurisdiction is distributed in Canada, as in the United States, between the Federal and the Provincial (State) legislatures; but in Canada there is a peculiar provision for "disallowance" of statutes passed by all these bodies. The Federal Executive may disallow (that is annul) any statute of a Provincial legislature within one year after its passage. And the King-in-Council (really the Colonial Secretary) may disallow any statute of the Federal legislature within two years.

In the earlier years disallowance was of frequent occurrence, and the Provinces are still sometimes held in check by Ottawa (for example, recent British Columbia anti-Japanese legislation [2]); but there has been no interference by Downing Street with Canadian Federal legislation for nineteen years; and there will be none in the future. If it were attempted—well, Canada is too big now to tolerate it.

The Governor-General of Canada is appointed (for five years) by the British Executive, but with very careful attention to Can-

[2] British Columbia and California agree about Asiatic labor.

adian susceptibilities. Like the King, whom he represents, the Governor has nominally very extensive powers; and like the King he retains them by most assiduous abstension from the slightest appearance of attempt to exercise them. He takes no part in our political discussions. He may indeed possess opinions about them (we have no express law against that), but he must refrain absolutely from any expression of them, and must appear as though he had none. Now and then, in answer to some of the many congratulatory and loyal addresses, he makes a little slip or appears to do so; the newspapers are at once at his throat; the next day you will see some semi-official denial or disclaimer; and the Governor is more careful in future.

It is a very curious situation, but we rather like it. If our Governor were in reality our chief executive officer (such as the President is in the United States) we would not, of course, import a new British nobleman every five years for the work—he would be the most incapable of mortals for it. But as our real chief is our Prime Minister, who holds office by our votes and at our pleasure, who is one of ourselves, and the one that we deem most worthy of our trust, we care little that the nominal chief is somebody else. No doubt his presence with us is a badge of our colonialism, our subordination, our political inferiority, about which some of us are becoming a little sensitive; but we find some compensation in the absence of presidential elections; and a great many of us would rather retain subordinate relations with Great Britain than have no relations at all—which is the alternative.

The Governors of our Provinces are appointed by the Federal Executive. They, too, are legislative and executive nonentities. They have strong political convictions, for they were all party men. But during their five years they must pretend that they have none. Their duty is the socialities—dinners, foundation-stones, balls, church-openings, school-closings and the like. It is astonishing how quickly these party fighters relapse into homilies.

Canadian Administrations are formed in the British fashion, namely, not by the King or Governor, but by the House of Commons. That is to say, the Governor must make Prime Minister the man whom the House of Commons approves; and the Prime Minister in the selection of his cabinet is limited by the same necessity. The House of Commons may at any moment express its disapproval of the Administration (vote want of confidence in

it) and out it goes. In the United States, the Administration is responsible to the President or Governor, and is unaffected by adverse votes in the Assemblies. In Canada, the Administration is responsible to the House of Commons, and may be displaced at any time. There are advantages in both systems, as the present British Ambassador in Washington has explained in his "American Constitution."

The Canadian Senate is the result of a curious compromise between aristocratic and democratic notions. Being not only British but, by reason of geographical situation, anti-American, we declared that we wanted a "constitution similar in principle to that of the United Kingdom." [3] At the same time we had no "Lords," and only a very few "Sirs" of any kind, out of which to make a House of Lords. We did the best we could: To elect our second-chamber men, was too democratic; to create off-hand seventy-two Peers with everlasting hereditary rights, was much too aristocratic; so we said that seventy-two ordinary men should be Senators for their respective lives; and that vacancies should be filled up with similar persons for their lives. The appointments had, of course, to be made by somebody; so, using as nearly as we could the language of summons to the House of Lords, we said that—

"The Governor-General shall, from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate."

Neither the Queen, however, nor the Governor has anything to do with the appointments. The Ministers of the day have sole control; and they, quite naturally, appoint their political friends—very frequently men who have been defeated in elections for the House of Commons. The result of this stupid arrangement is that during Sir John A. Macdonald's long tenure of office, the Senate became overwhelmingly Tory; that it did nothing at all while its friends were in office; that it became very busy and energetic as soon as its friends were beaten at the polls; that, thereafter, it speedily (for most of the Senators are elderly when appointed) assumed a Liberal complexion; and that it is now so liberal that it will do nothing more until the Tories get back to office. Formerly the Liberals scoffed at the Senate and insisted upon its reform. Now it is the Tories who are convinced of its uselessness and absurdity.

[3] So recited in the Federation statute.

In Canada there are but two Federal Courts—one the Exchequer Court in which claims against the Federal Government and a few other cases are tried; and the other the Supreme Court of Canada, having appellate jurisdiction from the Exchequer Court and from all final decisions of the Provincial (State) courts.

From all these Courts, appeal lies to the Judicial Committee of the Privy Council in England. Canada still shows her humble breeding by the acknowledgment that she is unfit to decide her own lawsuits. To many of us, the situation is full of humiliation. When the United States had a white population less than half the number of our people they established a Supreme Court with which they have always had good reason to be well satisfied. Canada has never been quite sure of its Supreme Court; and the principal reason for its insufficiency is its mere colonial character. Were its judgments final, we would be more careful of its composition, and seats in it would not be declined. It is stronger to-day than ever before. When Canada comes to trust it, appeals to England will cease. Already Australia has been accorded (really, though not in form) the right to inhibit appeals to judges in the antipodes. Canada has no such power, but that, too, is a question of form. She can in reality do as she likes; for no power that she wants will or can be denied her.

When Canada was a *Colony* her fiscal policy was made in Downing Street, London. The old notion of a colony was that it should furnish raw materials to its metropolitan only; consume the manufactures of the metropolitan only (making nothing for itself); and provide asylum for the surplus population of the metropolitan. The advent of free trade (in the eighteen-forties) terminated all imperial restrictions upon colonial commerce, and Canada was not only permitted but compelled, somewhat too suddenly, to adopt the new ideas.

Shortly afterwards Canada exhibited striking inclination to encourage her own manufactures—even to the injury of British firms—by a system of protective duties. The Colonial Office was amazed at such presumption and forbade it. The Canadian Government replied as follows:

"Self-government would be utterly annihilated if the views of the Imperial Government were to be preferred to those of the people of Canada. It is therefore the duty of the present Government (of Canada) distinctly to affirm the right of the Canadian legislature to adjust the taxation of the people in the way they

deem best, even if it should unfortunately happen to meet the disapproval of the Imperial Ministry. Her Majesty cannot be advised to disallow such Acts, unless her advisers are prepared to assume the administration of the affairs of the Colony, irrespective of the views of its inhabitants."

Not being quite prepared for the assumption of such large responsibility, the British Ministry receded, and Canada's first tariff-protection against British manufacturers became law.

Since then Canada has made such tariffs for herself as she pleased; and now her fiscal independence is so complete that she is ready to negotiate with great Britain as with the United States, or any other foreign country, for tariff preferences.

As a matter of form, Canada has no relations with anybody but the Colonial Office in London, and has therefore no foreign representatives. In her superlatively colonial days one Province of Canada could not communicate with another. If a Governor of Upper Canada wished to write a note to the Governor of Lower Canada, he sent it to the Colonial Office with a request that it might be forwarded to its destination. And until recently, if a Canadian Governor desired to communicate with the British Ambassador at Washington he wrote to the Colonial Office; the Colonial Office sent the despatch to the Foreign Office (next door); and the Foreign Office sent it on to Washington. That is all still done; but our Governor now sends direct to the British Ambassador a copy of the despatch which he will officially receive a month or two afterwards.

Two Canadian Ministers have personally just completed long tariff negotiations with the Government of France. A few years ago any proposal that we had to make to France would have gone to the Colonial Office, then to the Foreign Office, then to the British Ambassador at Paris, then to the French Foreign Bureau, then (probably) to the men it was intended for. French Ministries do not live long enough to arrive at tariff agreements in that way.

Succeeding that style of thing it was permitted that a Canadian might be associated with a British plenipotentiary—associated as an assistant merely; then the Canadian was permitted to negotiate while the British gentleman looked on; now he needn't look on unless he wishes to—he may attend to his own affairs. Once declare that

"self-government would be utterly annihilated if the views of the Imperial Government were to be preferred to those of the Canadian people,"

and the result necessarily follows that Canadian statesmen must be the executors of Canadian will. The form, however, still remains, and the Canadians must still be accredited by the British Foreign Office.

In Canada's ultra-colonial childhood, her British Governors, as representatives of the King, did as they pleased with the Canadian militia—enrolled them, officered them, ordered then out. Nominally British sovereigns have still control, for the only clause in the Canadian constitution relating to the subject is this:

"The Commander-in-Chief of the Land and Naval Militia, and of all naval and military forces, of and in Canada, is hereby declared to continue and be vested in the Queen."

Of course nobody meant that Queen Victoria was personally to command the forces; but persons not familiar with the curious formal deference of Britons to their sovereigns accompanied by the sturdiest denial of all real subordination, would hardly imagine that, quite consistently with this clause, Queen Victoria had no more effective control over the Canadian militia than had the President of the United States. The whole subject is regulated by Canadian statute; the official chief of the Canadian forces is the Minister of Militia; and the active command is provided for by Canadian legislation.

The difference between being really at war, and only being legally and nominally so, is somewhat important and very unusual. As part of the British Empire Canada is, as a matter of constitutional law, at war with any nation at odds with Great Britain. But Canada is under no constitutional obligation, and has never agreed, to take active part in British wars. Canada has always done so, but although, for example, she was a few years ago legally (as a matter of international law) at war with the Transvaal and sent contingents there, she might, had she so wished, have acted as a neutral.

Only once in our history (at the Colonial Conference of 1902) has Canada been asked to declare what she would do in case of Great Britain becoming involved in a European war. The answer (in which Australia joined) was as follows:

"The representatives of Canada and Australia were of opinion that the best course to pursue was to endeavour to raise the standard of training for the general body of their forces, to organize the departmental services and equipment required for the mobilization of a field force, leaving it to the colony, when the need

arose, to determine how and to what extent it should render assistance."

In form, then, and according to all statutes and international law, Canada is still a colony; in reality she is a self-governing community. In form all her legislation is subject to approval by the Colonial Office; in reality such approval is never asked, and dare not be withheld. In form all her foreign relations are managed for her by the British Foreign Office; in reality she makes her own tariff arrangements. In form she becomes a belligerent whenever Great Britain is at war; in reality she is a belligerent or not as she may choose.

In form Canada is a colony—a subordinate and subservient and dependent colony.

In reality Canada is independent, and may, if she choose, at any moment add form to reality.

At present Canada shows no desire for formal separation. She will not, of course, always be content to wear livery. Change is inevitable. Some of our people suggest Imperial Federation, but so far no one of them has been able to suggest a scheme which does not involve the loss of control of some of our own affairs. That control has, with very much difficulty, been brought across the Atlantic. No minutest part of it will ever return.

Canadian Independence is the only other alternative. We are not ashamed, we are rather proud, of its present reality. Forms sometimes last long after their contents have vanished.

JOHN S. EWART.

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NOTES.

"DYING WITHOUT ISSUE" CONSTRUED IN DEVISES OF REAL PROPERTY.—At common law, a devise in fee, followed by the words "but if he die without issue," followed by a limitation over, raised an estate-tail by implication; *Brice* v. *Smith* (1787) 1 Willes Rep. 1; and the failure was construed as an indefinite failure of issue. Unless the limitation could take effect as a remainder, it was void for remoteness. *Doe dem. Cadagon* v. *Ewart* (1838) 7 A. & E. 636; *Bigge* v. *Bensley* (1783) 1 Bro. C. C. 187. This result was obviated by statutes which provided for a construction as a definite failure. Stat. 1 Vict. ch. 26 § 295; Laws N. Y. 1896 ch. 547 § 38. After the statutes, the first legatee has a determinable fee, and the limitation over takes effect as an executory devise. But the phrase to-day has assumed a new character and a new meaning. Formerly, it was a phrase of limitation, used by the testator to guide the devolution of the estate after it might leave the hands of the first beneficiary. But the context of the will may have regard merely to the time of the testator's death, and so used, the phrase is not one of limitation but a mere substitutionary devise, in case one of the

legatees dies before the will takes effect; it is a provision against intestacy, and the testator provides for no further devolution than the first taker. If the devisee take at all, he gets an absolute fee. The question is no longer one of definite or indefinite failure, but whether the words import a limitation engrafted on the estate already given, or whether the testator has in mind one of the many contingencies liable to cause a lapse, and in describing it and providing a substitution has used words which happen to be identical with the stock phrase of limitation.

The development of this rule was comparatively late, and was due to several causes. The chief of these was probably the influence of two early English cases which applied such a construction. *Doe* v. *Sparrow* (1811) 13 East 359, and *Clayton* v. *Lowe* (1822) 5 B. & A. 636. These cases were plainly decided on their facts: in the former, the limitations in one clause were read over into a succeeding clause; the latter case involved incongruous provisions. These cases are far from establishing a fixed rule. Both were followed in *Caldwell* v. *Skilton* (1850) 13 Pa. 152. The rule in *Caldwell* v. *Skilton* was recognized in *Jessup* v. *Smuck* (1851) 16 Pa. 327, *Karker's Appeal* (1869) 60 Pa. 141 and *Fahrney* v. *Holsinger* (1870) 65 Pa. 388, and was solidified in the later Pennsylvania cases. *Engel's Estate* (1897) 180 Pa. 215; *Flick* v. *Forest Oil Co.* (1898) 188 Pa. 317. Another cause of the development of the rule was the failure or refusal, *Mickley's Appeal* (1880) 92 Pa. 514, 518; *Hancock's Estate* (1879) 13 Phila. 283, to recognize the distinction in the English cases, Smith, Exec. Int. §§ 662, 665, 666, between real property and personal property in this connection. So, too, courts have confused English cases where there was an alternative limitation to the issue, besides a limitation over in default; as in *Fowler* v. *Duhme* (1895) 143 Ind. 248, where the court—besides relying upon *Doe* v. *Sparrow, supra,* and *Clayton* v. *Lowe, supra*—cited *Gee* v. *Manchester* (1852) 17 Q. B. 737. These English cases stand on a special ground. The devise is to the first legatee in fee; the limitation to the issue cannot raise an estate-tail, because if there are issue, they all take, not merely the eldest son. The other limitation over is by way of executory devise, upon the happening of the contingency. But because of both limitations over, there is no contingency at all, for one of the events specified must of necessity happen and thus it is impossible for the first taker to keep the whole estate. The possibility, however, of keeping the estate is a necessary element to make a limitation over operate by way of executory devise. While the alternative devises determine the first taker's estate in fee at his death, this may not necessarily give him a strict life estate. While the court itself could so cut down his fee, by rejecting the words of inheritance and thus give effect to the devise over as a remainder, it is loath to do so. It gives effect to all the words by treating the phrase as a substitutionary devise. Another element which has aided the growth of the rule has been the employment in the later American cases of the general principle that a devise in fee will not be cut down by subsequent provisions, unless the latter are clear and certain. See *Biddle's Estate* (1857) 28 Pa. 59. This is illustrated by the long line of New York cases dealing with the rule, *Vanderzee* v. *Slingerland* (1886) 103 N. Y. 47, although the rule was not applied in *Buell* v. *Southwick* (1877) 70 N. Y. 58, and in *Nellis* v. *Nellis* (1885) 99 N. Y. 505.

It may be noted, however, that two cases often cited, are not in point, *Moore* v. *Lyons* (1840) 25 Wend. 119, involving a question of survivorship, and *Livingston* v. *Greene* (1873) 52 N. Y. 118, a question of vesting of remainders. The New York courts are eager to seize upon slight expressions to defeat the rule and to give the words there "natural import." *Benson* v. *Corbin* (1895) 145 N. Y. 351, 359; *Washbon* v. *Cope* (1895) 144 N. Y. 287.

The recent case of *Fifer* v. *Allen* (Ill. 1907) 81 N. E. 1105 throws an interesting light upon the present status of the rule. The court recognized the rule, but held that the words should be construed in their "natural and primary" sense; and that therefore the contingency was referable to a death as well before as after that of the testator. If this is a sound way at arriving at the testator's intent it strikes at the existence of the rule itself.

SUSPENSION OF THE POLICE POWER.—It is usually maintained that a State cannot divest itself of its governmental power; that to this rule the taxing power is only a nominal exception, Cooley, Const. Lim. (7th Ed.) 400; and that the police power is no exception at all. *Stone* v. *Mississippi* (1879) 101 U. S. 814. Yet the application of the principle that the State cannot barter away its police power has been confined to cases where to enforce the State's self-imposed restriction would endanger the public health, safety, or morals, *Stone* v. *Mississippi, supra; Fertilizing Co.* v. *Hyde Park* (1877) 97 U. S. 659; *Butchers' etc. Co.* v. *Crescent City Co.* (1884) 111 U. S. 746; *Beer Co.* v. *Massachusetts* (1877) 97 U. S. 25, whereas the scope of the police power extends also to laws designed for the protection of the public welfare. 5 COLUMBIA LAW REVIEW 462; 7 id. 322. There remains a broad region wherein the State may bind itself with regard to matters which fall nevertheless within the police power. Thus it is now established that a city may, under proper legislative sanction, make binding contracts fixing rates of fare, 2 COLUMBIA LAW REVIEW 487; *Cleveland* v. *Cleveland City Ry. Co.* (1904) 194 U. S. 517; contra, *Laurel Fork R. R. Co.* v. *W. Va. Transp. Co.* (1884) 25 W. Va. 324, or of water, *Los Angeles etc. Co.* v. *Los Angeles* (1898) 88 Fed. 720, affirmed 177 U. S. 558; *Omaha Water Co.* v. *City of Omaha* (1906) 147 Fed. 1, or precluding the city from establishing municipal water works, *Walla Walla* v. *Walla Walla Water Co.* (1898) 172 U. S. 1; *Vicksburg* v. *Vicksburg Waterworks Co.* (1906) 202 U. S. 453, thus divesting itself, at least temporarily, of some of its police powers. *Budd* v. *New York* (1892) 143 U. S. 517; *New Orleans Waterworks Co.* v. *Rivers* (1885) 115 U. S. 674. Upon analogous principles exclusive public service franchises granted by duly authorized municipalities have been protected against subsequent legislation. *New Orleans Gas Co.* v. *Louisiana Light Co.* (1885) 115 U. S. 212; *Vicksburg* v. *Vicksburg Waterworks Co., supra; City Ry. Co.* v. *Citizens' R. R. Co.* (1896) 166 U. S. 557. The effect of these authorities—that a state can by contract abandon an inherent governmental attribute—whatever its convenience to municipalities, involves a difficulty in political theory which cannot be evaded by the pretence that a temporary suspension of the power is merely one way of exercising it; since the power is continuing in its nature, and cannot be exhausted by a

single exercise. *R. R. Commission Cases* (1886) 116 U. S. 307; *Villavaso* v. *Barthet* (1887) 39 La. Ann. 247; *Rogers etc. Co.* v. *Fergus* (1899) 178 Ill. 571, affirmed 180 U. S. 624. Owing to two rules of construction, however, the difficulty arises in comparatively few cases. One rule is that the authority of a municipal corporation to make a contract surrendering its police power must either be express, or if implied, must be inferable of necessity. *Freeport Water Co.* v. *Freeport City* (1901) 180 U. S. 587; *Detroit Citizens' Street Ry. Co.* v. *Detroit Ry.* (1897) 171 U. S. 48. The other is that in order to find the existence of such a contract, the evidence of contractual intent on the part of the government must be so clear as to be susceptible of no other construction. *Knoxville Water Co.* v. *Knoxville* (1903) 189 U. S. 434; *Stanislaus County* v. *San Joaquin etc. Co.* (1904) 192 U. S. 201; *Ruggles* v. *Illinois* (1883) 108 U. S. 526. Provision for maxima rates may not, under this rule, suffice to establish a contractual right to charge up to the maximum. *Rogers etc. Co.* v. *Fergus, supra; Knoxville Water Co.* v. *Knoxville, supra.* A similar bulwark to the position of the government exists in the cases where exclusive franchises have been granted, since their validity has been often denied on the ground that they were monopolies, and hence that the State never could have intended to grant them. *Los Angeles etc. Co.* v. *Los Angeles, supra,* 732.

Two cases recently decided illustrate the operation of these rules of construction. In *City of Bessemer* v. *Bessemer Waterworks Co.* (Ala. 1907) 44 So. 663 the city had power to provide "by contract, ownership of waterworks, or otherwise" for a municipal water supply, and to regulate water rates. It was held that an accepted ordinance fixing the maxima rates for thirty years would be upheld against a subsequent ordinance reducing them. Here the proofs of the city's power and intention to contract were clear and convincing. On the other hand, in *Home etc. Co.* v. *Los Angeles* (Cal. 1907) 155 Fed. 544, the city's power to fix rates by contract was of dubious implication, and it was held that under the two rules above noted a contract was not made out from an accepted ordinance fixing maxima telephone rates for fifty years. A distinction is sometimes made between a city's power to fix and regulate rates, which is a governmental function, and its power to provide for works of public utility, in the exercise of which it acts in a corporate capacity; *Freeport Water Co.* v. *Freeport City, supra; Illinois etc. Bank* v. *Arkansas City* (1896) 76 Fed. 271; but this merely relieves contracts involving the latter power from the peculiar rules of construction applicable to alleged surrenders of governmental functions. *Illinois etc. Bank* v. *Arkansas City, supra,* 293. It does not, as apparently indicated in *Omaha Water Co.* v. *City of Omaha, supra,* 6, deprive a contract involving the exercise of both functions of its character as a suspension of the police power, in so far as rate-fixing provisions are concerned. Both the principal cases are properly decisive of this point, since in each a contract providing for a supply of public utilities and fixing rates was treated as a suspension of the police power.

Aspects of the Maxim of Unclean Hands.—The equitable maxim requiring "clean hands" of the complainant, being a universal guide for the granting of any equitable relief, the iniquitous conduct need not be proved

as an affirmative defense, *Simmons Medicine Co.* v. *Mansfield Drug Co.* (1893) 93 Tenn. 99, but will be considered by the court of its own motion. *Memphis Keeley Institute* v. *Keeley Co.* (1907) 155 Fed. 964. Such conduct may consist of actual fraud, *Bagwell* v. *Johnson* (1902) 116 Ga. 464, misrepresentation, *Cadman* v. *Horner* (1810) 18 Vesey 10, bad faith and sharp overreaching, *Michigan Pipe Co.* v. *Fremont etc. Co.* (1901) 111 Fed. 284, an artfully contrived snare, *Pope Mfg. Co.* v. *Gormully* (1891) 144 U. S. 224, or mere breach of a duty to speak. *Byars* v. *Stubbs* (1887) 85 Ala. 256; 2 Kent, Comm. 490. The complainant will be denied relief if he sues as the puppet of a rival company, *Forrest* v. *Manchester etc. Co.* (1861) 4 De G. F. & J. *125, but not if he sues *bona fide* in his own interest and merely his motives are questionable. *Rice* v. *Rockefeller* (1892) 134 N. Y. 174; *Hodge* v. *U. S. Steel Corporation* (1902) 64 N. J. Eq. 111; cf. *Mutter* v. *E. & M. Ry. Co.* (1888) 38 Ch. Div. 92. There is a dearth of authority as to whether the fraud of an agent may be imputed to his principal, so as to make the latter's hands unclean. Clearly if he has, or reasonably should have, knowledge of the fraud his hands are unclean, even though such knowledge be gained at the trial. *Rosenberg* v. *Haggerty* (1907) 38 N. Y. Law. Jour. No. 51. When he is innocent, however, it may be said, as in New Jersey, see the principal case, *post*, that since his moral standing is unimpeachable, he has a clear call upon a court of conscience, the limitation as to unclean hands being purely a personal bar. The answer to this is found in the undeniable modern tendency to extend the principal's responsibility in all respects, the practical disadvantage of ignoring the agent's conscience (cf. the case of corporations, Pomeroy, Contracts, Sec. 278) and the logic, under the recognized theories of agency, of terming the principal's status unconscionable. *Com'l Bank* v. *Burch* (1892) 141 Ill. 519. A strong supporting analogy is found in actions of deceit, which by the weight of authority, Burdick, Torts, 379, 380, are maintainable against an innocent principal for the frauds of his agent. Contra, *Kennedy* v. *McKay* (1881) 43 N. J. Law. 288. The doctrines of hardship and unclean hands are oftentimes confused. See Pomeroy, Eq. Jur. Sec. 400, citing *Willard* v. *Tayloe* (1869) 8 Wall. 557. The latter case involved hardship solely. The assertion of his right and the mere filing of the bill by the complainant do not soil his hands, unless he is actually guilty of a fraud or imposition on the court by claiming more than he should. *Camden Iron Works* v. *Camden* (1902) 64 N. J. Eq. 723; *Robinson* v. *Brooks* (1903) 31 Wash. 60. The doctrine of unclean hands looks primarily to the nature of the acts of the parties, that of hardship to the relative effects of a decree on the parties, taking into account not only their acts, but also collateral circumstances. See *Willard* v. *Tayloe, supra.* The latter, if not reasonably within the contemplation of both parties when they contracted, *Franklin etc. Co.* v. *Harrison* (1891) 145 U. S. 459, 473, may bar a decree because of hardship, but never, it is submitted, because of unclean hands. The question of unclean hands is in no way coextensive with the question of morality or ethics. See Sir Frederick Pollock in 4 COLUMBIA LAW REVIEW 25-27. For, on the one hand, a complainant's hands may be unclean though he acted in good faith, as in the case of a false representation; *Wall* v. *Stubbs* (1815) 1 Madd. Ch. 54; *Best* v. *Stow* (N. Y. 1845) 2 Sandf. Ch. 298; and on the other hand, immor-

ality and reprehensible conduct, *Dering* v. *Earl of Winchelsea* (1787) 1 Cox Eq. 318, or degraded character, *Wright* v. *Wright* (1893) 51 N. J. Eq. 475, do not make his hands unclean. Moreover, they do not affect the equities of the matter before the court. *Post* v. *Campbell* (1901) 110 Wis. 378.

This introduces a limitation on the operation of the maxim under discussion. Equity is not a general "avenger of wrongs." *Kinner* v. *Lake Shore Ry. Co.* (1903) 69 Oh. St. 339. The limitation is often expressed in the form that the iniquitous conduct must be connected with the subject matter of the suit, *Woodward* v. *Woodward, supra,* or have "a necessary relation to the equity sued for," *Dering* v. *Earl of Winchelsea, supra,* or be in the same transaction. *Trice* v. *Comstock* (1903) 121 Fed. 620; *Bateman* v. *Fargason* (1880) 4 Fed. 32. The statement of the rule shows its inevitable vagueness. Certainly the complainant should not be barred from relief simply because the right or thing he seeks to protect has been obtained by fraud. *American Ass'n Limited* v. *Innis* (1901) 109 Ky. 595; see *Trice* v. *Comstock, supra; Upchurch* v. *Anderson* (Tenn. 1898) 52 S. W. 917. Otherwise, the mere fact that a chattel or right was used fraudulently, even in a wholly unconnected transaction, would bar relief. *Hamilton* v. *Wood* (1893) 55 Minn. 482. Such, however, would be the logical result of the rule stated in some cases (as in the principal case in the lower court, *post*) that the relief will be denied if the very thing sought to be protected is itself an instrument of fraud. *Manhattan Medical Co.* v. *Wood* (1883) 108 U. S. 218; *Memphis Keeley Institute* v. *Keeley Co., supra; Hilson* v. *Foster* (1897) 80 Fed. 896. The true principle governing the cases last cited is that if the *user* sought to be protected constitutes a continuing fraud, as where labels have false matter on them, *Worden* v. *California Fig Syrup Co.* (1902) 187 U. S. 516, or where the copyright is itself a piracy, *Edward Thompson Co.* v. *American Law Book Co.* (1903) 122 Fed. 923, the complainant's hands are unclean. Of course, if the false matter is collateral to the subject of litigation, as where the false labels were upon a different product, *Shaver* v. *Heller* (1901) 108 Fed. 821, the limitation applies. *Brown & Allen* v. *Jacobs Pharmacy Co.* (1902) 115 Ga. 429; cf. *Mossler* v. *Jacobs* (1896) 66 Ill. App. 571; *Edward Thompson Co.* v. *American Law Book Co., supra.* In determining whether the plaintiff's acts affect the equities in litigation, two rules are important. First, the chronological order cannot be decisive. Failure to recognize this has led some courts into confusion. See *Brutsche* v. *Bowers* (1904) 122 Ia. 226. Secondly, the complainant's fraud need not necessarily be done to the defendant himself. *Pride* v. *Andrews* (1894) 51 Oh. St. 405; *Moore* v. *Jorden* (1887) 65 Miss. 229; *Tantum* v. *Miller* (N. J. 1858) 3 Stockton 551. Contra, *Chicago* v. *Stock Yards Co.* (1896) 164 Ill. 224, 238.

In a recent New Jersey decision, an injunction at the suit of an innocent principal was granted to protect a secret process which had itself been fraudulently obtained by an agent. The court below held, first, that the agent's fraud made the principal's hands unclean, and second, applying the "instrument of fraud" rule, that the fraud was in the same transaction. *Vulcan Detinning Co.* v. *American Can Co.* (1906) 70 N. J. Eq. 588. The court above reversed the decree on the first point and refrained from considering

the second. Id. (1907) 67 Atl. 399. The use of the process itself here constituted a continuing fraud and the case, therefore, falls within the class already discussed. The result reached in the lower court was consequently correct on both points, whereas its line of reasoning on the second point, and the result reached in the higher court on the first point, were erroneous.

Admissibility of Self-Serving Claims of Title.—In a recent case in Kansas, *Hubbard* v. *Cheney* (1907) 91 Pac. 793, there was a controversy between the heirs of a husband and wife as to whether a deed purporting to convey land to said husband and wife jointly was in fact a mortgage as to the wife. Self-serving declarations of the husband, made while in possession, were admitted "to illustrate and qualify the possession" and the court distinguished these from declarations of the wife which were admitted as against interest. In actions involving title possession may be a material fact as it is *prima facie* evidence of title, *Roebke* v. *Andrews* (1870) 26 Wis. 311, 317, or, as sometimes put, raises a "presumption" of title. Sedgwick & Wait, Trial of Title to Land, § 717; Best, Evid. § 366. As showing such possession the conduct or physical occupation or custody of the property is clearly admissible. The intent or frame of mind which accompanies the conduct is a part of it because it characterizes it and in such capacity becomes relevant and admissible. Words of claim of title evidence this frame of mind, and, since they are not offered as proof of the truth of the fact asserted, are clearly beyond application of the Hearsay Rule. Wigmore, Evid. § 1768. The conduct plus the words forms a "verbal act," Wigmore, Evid. § 1772, or as it is often stated, the words are a part of the *res gestæ*. *Bunnell* v. *Studebaker* (1882) 88 Ind. 338; Taylor, Evid. § 580 *et seq.* It follows that the utterance must be strictly concurrent in time with the conduct which it covers, and in this it differs from a statement admissible under the rule with regard to spontaneous utterances, for the latter are regarded as proof of the truth of the fact asserted and as exceptions to the Hearsay Rule, and hence it need not be synchronous with any physical conduct. Clearly also the words would not be admissible independently, for they could then be relevant only as hearsay. Many cases have overlooked the fact that claim of title by one in possession of property is part of the "verbal act" including occupation or custody and have excluded evidence of such claim as hearsay, not being a declaration against interest. *Waring* v. *Warren* (N. Y. 1806) 1 Johns. 340; *Fischer* v. *Bergson* (1874) 49 Cal. 294. Other decisions have repudiated the verbal act theory as applied to this class of cases on the ground that it is "receiving the unsworn declarations of the party in his own favor." *Holmes* v. *Sawtelle* (1865) 53 Me. 179; *Kyle's Adm'r* v. *Kyle* (1864) 15 Oh. St. 15; semble, *Ware* v. *Brookhouse* (1856) 7 Gray 454; *Roebke* v. *Andrews, supra* (dissenting opinion). But the great weight of authority upholds the theory, *Reiley* v. *Haynes* (1888) 38 Kan. 259; *Avery* v. *Clemons* (1847) 18 Conn. 306, 309; *Roebke* v. *Andrews, supra; Amick* v. *Young* (1873) 69 Ill. 542, 544, and at least two jurisdictions have abandoned opposing doctrines in its favor. *R. R. Co.* v. *Clark* (1878) 68 Mo. 371; *Lemmon* v. *Hartsook* (1883) 80 Mo. 13; cf. *Darrett* v. *Donnelly* (1866) 38 Mo. 492; *Criddle's Adm'r* v. *Criddle* (1855)

21 Mo. 532; *Watson* v. *Bissell* (1858) 27 Mo. 220; *Creighton* v. *Hoppis* (1884) 99 Ind. 369; cf. *Travis* v. *Barkhurst* (1853) 4 Ind. 171.

It has been urged, that the declarations are inadmissible under this theory unless the conduct to characterize which they are offered is "equivocal or incomplete as a legal act." Wigmore, Evid. § 1774. Of course if the conduct apart from the utterance is a complete legal act in itself then the utterance cannot strictly form a part of that act, but so long as the utterance characterizes the conduct it would seem that the act is incomplete without it. Equivocality of the conduct, therefore, should become material in principle only in determining whether evidence of the utterance is cumulative, and the conduct should be held unequivocal when there can be no reasonable doubt as to its significance. The necessity of equivocality is not recognized by many text writers, 1 Greenleaf, Evid. (15th ed.) §§ 109, 110; Taylor, Evid. § 580 *et seq.;* Best, Evid. § 408 *et seq.,* and the cases seem to disregard it. *Lund* v. *Tyngsborough* (Mass. 1851) 9 Cush. 36, 42; *Wright* v. *Tatham* (1838) 7 A. & E. 313, 361. This may be due to the fact that in this class of cases the conduct is usually equivocal. See cases cited *supra.* But those decisions which touch upon the point either merely state that the conduct was ambiguous and needed explanation, *Cooper* v. *State* (1879) 63 Ala. 80; *Creighton* v. *Hoppis, supra; Lewis* v. *Burns* (1895) 106 Cal. 381 or were cases where the conduct involved was a complete legal act by itself apart from the utterance which accompanied it. Semble, *Shuck* v. *Vanderventer* (Ia. 1854) 4 Greene 264, 265. Thus it would seem that although conduct is otherwise well characterized, the utterance which goes to make up the relevant act should nevertheless be admitted, even though the practical consequence is that the utterance is useful chiefly as hearsay, unless barred by the cumulative rule.

Federal Power Under the Admiralty and Interstate Commerce Clauses.—Two conditions would seem necessary to give Federal courts jurisdiction under the Interstate Commerce clause of the United States Constitution: first, Congressional legislation; second, legislation regulative of interstate commerce. The first requisite, enforced in the days of Chief Justice Marshall, *Wilson* v. *Black etc. Co.* (1829) 2 Pet. 245, has been modified to the extent that, as to matters in which uniformity of legislation is necessary from the nature of the subject, the power of Congress is exclusive, and therefore State legislation upon such subjects is unconstitutional *per se,* whereas as to other matters the power of Congress is only paramount. *Cooley* v. *Board of Wardens* (1851) 12 How. 299; *Robbins* v. *Shelby Taxing District* (1886) 120 U. S. 489. The second requisite has been liberally construed so as to include not only the regulation of "commerce" in its narrow sense, but also of the conditions surrounding it. *Leovy* v. *United States* (1900) 177 U. S. 621. Since commerce includes navigation, *Gibbons* v. *Ogden* (1824) 9 Wheat. 1, the determination of what surrounding conditions are proper subjects of the power of Congress has necessitated a definition of "navigable waters of the United States." It has been decided that such water is that which may in its ordinary condition be made practically useful for the prosecution of interstate commerce,

Leovy v. *United States, supra; Cardwell* v. *American Bridge Co.* (1885) 113 U. S. 205, and over it Congress has unquestioned power, either exclusive or paramount, to legislate with regard to all matters which directly affect interstate commerce there carried on. *Lake Shore etc. Ry.* v. *Ohio* (1896) 165 U. S. 365.

From the earliest days the constitutional clause, providing that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, has been held to confer exclusive jurisdiction upon the Federal Government, *Martin* v. *Hunter's Lessee* (1816) 1 Wheat. 304, 335; *Houston* v. *Moore* (1820) 5 Wheat. 1, 49, and by necessary implication, to authorize legislation within this field. *United States* v. *Bevans* (1818) 3 Wheat. 336, 386. *In re Garnett* (1891) 141 U. S. 1. The field, however, is confined to the boundaries established in this country at the time of the adoption of the Constitution, *Waring* v. *Clark* (1847) 5 How. 441, 457; *The Genesee Chief* (1851) 12 How. 447; *The Belfast* (1868) 7 Wall. 624, or at most by those generally recognized to-day by the nations. Hughes, Admiralty § 114. Territorially the admiralty and maritime jurisdiction was at first held to extend only to tidal waters, *The Thomas Jefferson* (1825) 10 Wheat. 428, but in *The Genesee Chief,* supra, it was made clear that the true test was the public navigability of the water in question. See also 4 Columbia Law Review 131. But public navigability and capacity for interstate commerce are substantially coextensive, so that the waters affected by the constitutional clauses under discussion would seem to be practically identical. The identity of jurisdiction, however, seems confined almost entirely to that of territory. But this does not appear strange when one considers that one clause grants primarily the power to establish new rights and duties for the purpose of regulating commerce, while the grant of the other is primarily the power to apply, and to legislate with regard to, remedies for the infringement of already recognized rights and duties.

In the light of this discussion a recent Federal decision would seem of doubtful soundness, in which it was held that a Congressional statute requiring the approval of the Secretary of War of all structures tending to obstruct navigable waters of the United States, and authorizing the Attorney-General to secure an injunction against such structures, was justified under both the commerce and admiralty clauses. *United States* v. *Banister Realty Co.* (1907) 155 Fed. 583. In the first place, its very wording shows it to be regulative of commerce in the broader acceptation of that phrase, while it is also creative of new rights and duties, and not merely regulative of those already established, and would, therefore, be clearly constitutional under the commerce clause, while its classification as an admiralty regulation would justify the inquiry whether it did not enlarge that field unconstitutionally. Decided cases make it plain that the right of the State to have waters kept clear has been uniformly conceived of as one connected with the public interest in commerce, and not involved in admiralty jurisdiction. *Woodman* v. *Kilburn Mfg. Co.* (Fed. 1867) 1 Biss. 546; *United States* v. *Duluth* (Fed. 1871) 1 Dill. 469; *United States* v. *Milwaukee etc., Ry. Co.* (Fed. 1873) 5 Biss. 420. Moreover the remedy by injunction, which is authorized by the statute, is the same which was recognized as appro-

priate in these cases, but is one apparently unknown to admiralty law. Finally, there is no advantage to be gained by so stretching the meaning of the admiralty clause as to justify the statute in question, for the waters which may be affected by the commerce clause are as extensive as those affected by the admiralty clause, and the right to legislate under the former is much more extensive than that under the latter.

NATURE OF RECEIVERS' CONTRACTS OF SALE.—The English and American courts agree that a receiver in making contracts cannot be considered as the agent of the defendant. *Burt* v. *Bull* [1895] L. R. 1 Q. B. 276; *Riggs* v. *Pursell* (1876) 66 N. Y. 193. The English courts hold further that "it is of course impossible to suppose that the relation of principal and agent exists between" the receiver and the court, and that it must therefore be the intention that the receiver contracts on his own responsibility, "because otherwise no one would be responsible for his acts." *Burt* v. *Bull, supra.* The American courts almost uniformly state that a receiver contracts as agent of the court, *Lehigh etc. Co.* v. *Central R. R. of N. J.* (1882) 35 N. J. Eq. 426; *People* v. *Open Board etc. Co.* (1883) 92 N. Y. 98, and that a contract is entered into between the court and the purchaser. If the court be conceived of as an entity capable of holding property in trust, Laws N. Y. 1893 c. 701 § 1; *McCosker* v. *Brady* (N. Y. 1846) 1 Barb. Ch. 329. 343, no reason appears why it may not have the capacity to contract. That one of the parties must adjudicate on its terms and in case of breach award damages, *Wampler* v. *Shipley* (Md. 1831) 3 Bland 182, is perhaps not an insuperable objection to the theory of the existence of a contract, as the court is of course bound to determine in accordance with the law. Nor the fact that the purchaser might be powerless to compel performance by the court; for this would simply be due to the failure of the court to exercise its ordinary judicial functions, and not to the lack of any binding quality in the contract under the rules of law. The public policy which might refuse to uphold a contract where one of the parties to it is the arbitrator, would doubtless not extend to the case where such a party is a court, and perfectly disinterested. Such a contract would exist, nevertheless, only in abstract logic, and is entirely without the scope of ordinary contracts.

Although damages have sometimes been awarded as if a contract actually existed, *People* v. *Open Board etc. Co., supra; Drake* v. *Goodridge* (Fed. 1869) 6 Blatchf, 531, the general attitude of the courts, and the decisions, are inconsistent with the contract conception. Sales are set aside at the request of the purchaser where the latter would have no right to demand relief under the principles of equity as applied to ordinary contracts. *Fisher* v. *Hersey* (1879) 78 N. Y. 387; *Clayton* v. *Glover* (N. C. 1857) 3 Jones Eq. 371; 3 COLUMBIA LAW REVIEW 593. And although it is generally held that mere inadequacy of price is not a sufficient ground for setting aside, *Strong* v. *Catton* (1853) 1 Wis. 471, 496, yet if any other ground appear which makes such action equitable, this ground is seized upon, and sales are set aside, after confirmation, and over the objection of the purchaser, under circumstances which would not warrant a court of equity in cancelling a contract between private parties. *Mound City Life Ins. Co.* v. *Hamilton*

(1876) 3 Tenn. Ch. 228, 231; *Bean* v. *Haffendorfer Bros.* (1887) 84 Ky. 685. The purchaser alone is bound, not the court. The statement made in the cases, that the purchaser buys subject to the future order of the court upon the equities of the parties to the suit, would seem to refute any idea of a contract. *Downer* v. *Cross* (1853) 2 Wis. 371; *Lupton* v. *Almy* (1856) 4 Wis. 242.

The results reached in the cases necessitate the conclusion that a receiver's sale is merely a judicial means of transferring the interest of the defendant in the property, "whether it may be," *Arnold* v. *Donaldson* (1888) 46 Oh. St. 73, without a contract arising at any time. The purchaser becomes a quasi party to the action, *Blossom* v. *Milwaukee etc. Railroad Co.* (1863) 1 Wall. 655; *Porter* v. *Hanson* (1880) 36 Ark. 591, and submits himself to the decrees of the court, *Matter of Attorney-General* v. *Continental etc. Co.* (1883) 94 N. Y. 199; *Allen* v. *East* (Tenn. 1874) 4 Baxt. 308, which acts on general equitable principles irrespective of contract. *Fisher* v. *Hersey, supra; Strong* v. *Catton, supra.* A recent case in New York, *People* v. *New York Building-Loan Banking Co.* (N. Y. 1907) 82 N. E. 184, inconsistent with a previous holding, *People* v. *Open Board etc. Co., supra,* illustrates this theory. A purchaser asked to be relieved from his purchase because of defect of title. The court set aside the sale, and ordered the repayment of the deposit, but refused interest thereon, and costs of examination of title, and of the action, saying that "the purchaser cannot demand damages as for breach of a contract made by the court through its officer or agent, but has to rely on the court to do equity under the circumstances." Therefore his claim for compensation "is founded upon equity and not upon the breach of contract."

Subscriptions to Stock of Corporations Not Yet Formed.—There is a divergence of view in regard to the nature of the obligation arising from subscriptions to the stock of corporations not yet formed. In a recent Nebraska case the court suggested as dictum that the "subscriptions constitute a contract between the subscribers themselves." *Nebraska Chicory Co.* v. *Sednicky* (1907) 113 N. W. 245. With the desire to give the subscription binding force from the time of its making this theory has been frequently advanced. *Lake Ontario etc. R. R. Co.* v. *Mason* (1857) 16 N. Y. 451; *Minneapolis etc. Co.* v. *Davis* (1889) 40 Minn. 110. Assuming a contract between the subscribers, it may be regarded, first, as a contract to make offers to the corporation; second, as a contract to pay for the stock together with offers to the corporation; third, as a contract to pay the corporation on condition that it accepts the subscription. Since under the first two constructions the offer is revocable, the corporation does not obtain the right of a contracting party at the time of the subscription, as held in the above cases. The only possible right left to it, therefore, is that of a beneficiary which it would be denied in some jurisdictions since the subscriptions are not made for the sole benefit of the corporation. *Baxter* v. *Camp* (1898) 71 Conn. 245. But all these constructions seem inconsistent with the intention of the parties, and it is generally held and properly that the subscriptions are mere offers, having no binding effect until accepted; or more

logically that the subscriptions become offers as soon as there is an offeree. *Buffalo, etc., R. R. Co.* v. *Clark* (N. Y. 1880) 22 Hun. 359; *Yonkers Gazette Co.* v. *Taylor* (N. Y. 1898) 30 App. Div. 334; *Starrett* v. *Rockland, etc., Co.* (1876) 65 Me. 374; *Athol etc., Co.* v. *Carey* (1875) 116 Mass. 471. The decisions conflict as to what constitutes an acceptance of the offer, some requiring an act by an agent of the corporation, as for example, entering the subscriber's name in the stock book, *Starrit* v. *Rockwell, supra;* or making an assessment on the stock, *Buffalo etc. R. R. Co.* v. *Clark, supra,* and others requiring the mere act of incorporation. *Buffalo, etc., R. R. Co.* v. *Dudley* (1856) 14 N. Y. 336, 353; *Phœnix Warehousing Co.* v. *Bodger* (1876) 67 N. Y. 294. Clearly the latter view is illogical, since the existence of an offeree is not sufficient to establish an acceptance of the offer; but in view of the tendency to make subscriptions binding as soon as possible it is likely to prevail. 1 Cook, Corporations 75. The consideration is properly found in the interest which is acquired by the subscriber, *Buffalo, etc., R. R. Co.* v. *Dudley* (1856) 14 N. Y. 336, and the theory reiterated in the principal case "that the mutuality constitutes a sufficient consideration" cannot apply where no contract between the subscribers is recognized.

Two other theories have been advanced which give binding effect to a subscription from the date of its making. First, that the subscriber is estopped from revoking the offer. 1 Thompson, Corporations, 1288. Assuming a representation the only acts in reliance thereon are the other offers, and these could not result in a loss unless we assume that the subscribers are estopped from revoking, which would be begging the question; moreover there is the further objection that a promise is not a representation. The result of such a doctrine would be to make an act in reliance on a promise equivalent to a consideration. Second, it is held that if the subscription is a statutory step in the formation of a corporation it is irrevocable because the legislature so intended. 1 Cook, Corporations 75; *Buffalo etc. R. R. Co.* v. *Dudley, supra.* This is a fair statutory construction and applicable to a limited class of cases.

RECENT DECISIONS.

ALEXANDER B. SIEGEL, *Editor-in-Charge.*

ADMINISTRATIVE LAW—MANDAMUS—TITLE TO OFFICE.—The plaintiff, who was appointed secretary by one of two claimants to an office, brought mandamus for his salary. *Held,* mandamus would lie even though the title to the office was involved in the issue. *McKannay* v. *Horton* (Cal. 1907) 91 Pac. 598.

Mandamus is the proper remedy for one holding clear title to office to enforce purely ministerial acts, *Lawrence* v. *Hanley* (1891) 84 Mich. 399; *State ex rel. Leeds* v. *Atlantic City* (1889) 52 N. J. L. 332, but it is well settled that a disputed title to office may not be directly determined by mandamus since the proper procedure is by quo warranto, *King* v. *Mayor* (1788) 2 T. R. 259; *People ex rel. Cuthbert* v. *Detroit* (1809) 18 Mich. 338; *Anderson* v. *Colson* (1871) 1 Neb. 172; *People ex rel. Smith* v. *Olds* (1853) 3 Cal. 167, nor will title to office be determined collaterally by mandamus proceedings. *State ex rel. Vail* v. *Draper* (1871) 48 Mo. 213; *State ex rel. Jackson* v. *Thompson* (1895) 36 Mo. 70; *State ex rel. Dolan* v. *Lane* (1873) 55 N. Y. 217. In the principal case, the court admits that it had no power to decide the title as between the two contestants for the office of mayor, but says that it may inquire into it for the determination of the mandamus proceedings. But since the relator's right to any salary can be established only by determining the title of his appointor, it would not seem proper to grant the writ when the court's decision as to it has no legal effect. Cf. *Smith* v. *Hodgson* (Ga. 1907) 59 S. E. 272.

AGENCY—TENDER BY STRANGER—RATIFICATION.—The plaintiff and the defendant were cotenants of a mining claim. The plaintiff, who was absent, failed to pay the defendant a sum due for assessment work. Hearing of this, J., a stranger, sent an agent to tender the money to the defendant, who refused to accept it. The plaintiff later ratified J.'s act. *Held,* a good tender. *Forderer* v. *Schmidt* (1907) 154 Fed. 475.

The right of tender has always been held legitimately exercised by an agent. *Cropp* v. *Hambleton* (1586) Cro. Eliz. 48; *Bennett* v. *Hunter* (1869) 9 *Wall.* 326; 5 Dane, Abridg. 493, though not by a mere stranger. *Harris* v. *Gex* (1873) 66 Barb. 232. The authority to act as agent may be simply an implication of law, *Gentry* v. *Gentry* (Tenn. 1853) 1 Sneed 87, or inferred from a liberal construction of the circumstances. *Harding* v. *Davies* (1825) 2 C. & P. 77; *Brown* v. *Dysinger* (Pa. 1829) 1 Rawle 408. And, in the absence of previous authority, a ratification by the debtor is easily made out, *Tacey* v. *Irvin* (1873) 18 Wall. 549, even by setting up the tender as a defense. *Kincaid* v. *Brunswick* (1834) 11 Me. 188. But it is essential to a valid ratification that the act should have been done in behalf of a principal, and not as an independent principal, *Keightly* v. *Durant* [1901] A. C. 240; Huffcut, Agency, 32, and the creditors should have a right to be informed of the status of the person making the tender. *Mahler* v. *Newbaur* (1867) 32 Cal. 168. In the principal case J.'s intention to act as the agent of the plaintiff was by no means clear. The decision is, therefore, difficult to reconcile with the principles of agency, although supported by some authority. *Read* v. *Goldring* (1813) 2 M. & S. 86, semble.

ATTORNEYS—DISBARMENT—PERJURY.—A lawyer as a witness in a judicial proceeding made a false affidavit. *Held,* that since a witness was privileged from any prosecution except for perjury, he could not be suspended from practice. *Beckner* v. *Commonwealth* (Ky. 1907) 103 S. W. 378.

As it is better that an individual wrong should be without a remedy than that a witness should be restricted in the freedom of his testimony by the fear of consequences, immunity from actions of slander is universally ex-

tended. 1 Starkie, Slander, 1st Am. Ed., 185; *Hunckel* v. *Voneiff* (1888) 69 Md. 179. But when the witness swears falsely he commits an offense against the public and is punishable for perjury. As an action of disbarment involves the protection of the public, it seems that the principal case extends the doctrine of immunity too far. For instances where perjury has been considered a cause for disbarment, see *Matter of Ryan* (1894) 143 N. Y. 528; *Perry* v. *State* (Ia. 1852) 3 G. Greene 550; *In re Kerrigan* (1887) 31 Fed. 129.

CONFLICT OF LAWS—LAWS FOR DISTRICT OF COLUMBIA ENFORCIBLE IN STATES.—Under an act of Congress a receiver was appointed by the Comptroller of the Currency for an insolvent foreign corporation doing a banking business in the District of Columbia. *Held,* the receiver could collect assets by federal process in any part of the United States. *Lyons* v. *Bank of Discount* (1907) 154 Fed. 391.

Laws made for the District of Columbia are laws of the United States, *Cohens* v. *Virginia* (1821) 6 Wheat. 264, 424, and the general laws of the United States are laws of the District of Columbia. *Ex parte Norvell* (1892) 20 D. C. 348. As an adjunct of its general legislative power, and to render it effectual, Congress can enforce its laws throughout the United States, *Cohens* v. *Virginia, supra; Ex parte Siebold* (1879) 100 U. S. 371; *U. S.* v. *Knight Co.* (1894) 156 U. S. 1, 21, when necessary for the furtherance of the proper purpose of the law. *Cohens* v. *Virginia, supra,* 429. In case of conflict with state law the federal law governs. *Tennessee* v. *Davis* (1879) 100 U. S. 257.

CONFLICT OF LAWS—PRESUMPTION AS TO FOREIGN LAW—WHAT LAW GOVERNS.—A servant of an Alabama corporation sued in Alabama for a tort committed in Florida. *Held,* there being no presumption as to foreign law, and the parties having submitted themselves to the Alabama jurisdiction, the case must be decided by Alabama law. *Watford* v. *Lumber Co.* (Ala. 1907) 44 So. 567.

The common law is presumed to exist in states of English origin, *Flagg* v. *Baldwin* (1884) 38 N. J. Eq. 219; *Stokes* v. *Macken* (N. Y. 1861) 62 Barb. 145, and states populated by emigrants from such states, thus including all the United States but Texas, Louisiana and Florida. *Peet & Co.* v. *Hatcher* (1895) 112 Ala. 514. Contra, Missouri, which extends the presumption only to states of the first class. *Barhydt* v. *Alexander* (1894) 59 Mo. App. 188; *Clark* v. *Barnes* (1894) 58 Mo. App. 667. This is true even where a statute has altered the *lex fori. Whitford* v. *Panama Ry Co.* (1861) 23 N. Y. 465; contra, *Mutual Home, etc., Assn.* v. *Worz* (1903) 67 Kan. 506; cf. 1 COLUMBIA LAW REVIEW 489. But where the law applicable to the case is a foreign law, not the common law, it must be pleaded and proved as a fact. *Kelley* v. *Kelley* (1894) 161 Mass. 111. When this is not done the *lex fori* is applied. *The Scotland* (1881) 105 U. S. 24. The usual ground given is that the foreign law, in the absence of proof, is presumed to be identical with the *lex fori; Sandmeyer* v. *Ins. Co.* (1891) 2 S. D. 346; *James* v. *James* (1891) 81 Tex. 373; but where the *lex fori* is the common law, the reasoning is manifestly grotesque; and where it rests upon statute it is equally unsound. 6 COLUMBIA LAW REVIEW 469. It has been suggested that the failure to plead the foreign law operates as an admission that it is no more favorable to either party than the *lex fori.* Minor, Confl. of L. § 214. This leads to the conclusion of the principal case that the parties voluntarily adopt the *lex fori;* and would seem to provide a logical basis for a position which the courts have been bound to take. Cf. *Brown* v. *Wright* (1892) 58 Ark. 20; *Savage* v. *O'Neill* (1871) 44 N. Y. 298.

CONSTITUTIONAL LAW—JURISDICTION OF THE FEDERAL GOVERNMENT UNDER THE COMMERCE AND ADMIRALTY CLAUSES.—The Attorney-General brought an action for the removal of an obstruction to the entrance to Far Rock-

away Bay, under a Federal statute which requires the approval of the Secretary of War for the construction of any obstruction to navigable waters of the United States, and authorizing the Attorney-General to institute proceedings to enjoin its construction, or to compel its removal. *Held,* that the statute was constitutional under both the commerce and admiralty clauses. *United States* v. *Banister Realty Co.* (1907) 155 Fed. 583. See NOTES, p. 44.

CONSTITUTIONAL LAW—POLICE POWER.—A city had power to provide for a municipal water supply, and to fix and regulate water rates. *Held,* that an accepted ordinance fixing rates for thirty years constituted a contract within the impairment clause of the federal Constitution. *City of Bessemer* v. *Bessemer Waterworks Co.* (Ala. 1907) 44 So. 663.

A similar ordinance fixed telephone rates for fifty years. *Held,* it did not constitute a contract. *Home etc. Co.* v. *Los Angeles* (1907) 155 Fed. 554. See NOTES, p. 39.

CONSTITUTIONAL LAW—STATUTES—CONCLUSIVENESS OF APPROVAL OF GOVERNOR.—An acting Governor signed a bill intending to approve it, and directed his secretary to deliver it to the Secretary of State. The next day a successor in office found the bill on his desk, erased the signature, and vetoed it. *Held,* the bill became a law when signed with intention to approve. *Powell* v. *Hayes* (Ark. 1907) 104 S. W. 177.

In Illinois, as long as the bill remains before the Governor, he may reconsider his approval, *People* v. *Hatch* (1857) 19 Ill. 282, but once it passes beyond his control, as by filing in the office of the Secretary of State, the bill becomes law, although signed by mistake. *People* v. *McCullough* (1904) 210 Ill. 488. The rule enunciated in the principal case precludes any reconsideration even while the bill is yet in hand; and it seems that evidence of a final consideration, such as did appear in the principal case, and see *Marbury* v. *Madison* (1803) 1 Cranch 137, should be held essential to a conclusive approval and be embodied in the rule. The test of physical control, *supra,* calls for particular evidence of final consideration and while this may lead to certainty it ignores the importance of the intention to approve.

CONTRACTS—STATUTES OF LIMITATIONS—APPLICATION OF PAYMENTS.—A creditor, holding two notes of his debtor, applied an undirected general payment to that one of the two, which was barred by the Statute of Limitations. *Held,* the creditor could make such application, but did not take the note out of the Statute. *McBride* v. *Noble* (Colo. 1907) 90 Pac. 1037.

If a debtor fails to direct the application of a part payment, the creditor may appropriate it to any debt, Banning, Limitation of Actions, 2nd Ed. 73; *Ayer* v. *Hawkins* (1846) 19 Vt. 26, even if barred by the Statute of Limitations; *Mills* v. *Fowkes* (1839) 5 Bing. N. C. 455; *Ramsay* v. *Warner* (1867) 97 Mass. 8, 13; but the latter proposition has been criticized. 2 Dan., Neg. Inst., 5th Ed., § 1252; *Nash* v. *Hodgson* (1855) 6 DeG., M. & G. 474. A part payment ordinarily lifts the bar of the Statute because it is a deliberate act, which, while not a promise, constitutes, in the absence of contrary circumstances, *Roscoe* v. *Hale* (Mass. 1856) 7 Gray 274; *Lowery* v. *Gear* (1863) 32 Ill. 383, a clear recognition of a subsisting debt, from which a promise to pay it may be implied. *Corliss* v. *Grow* (1886) 58 Vt. 702. The weight of authority is in accord with the principal case in refusing to a creditor the power thus to take a debt out of the Statute. *Mills* v. *Fowkes, supra; Pond* v. *Williams* (Mass. 1854) 1 Gray 630; *Blake* v. *Sawyer* (1891) 83 Me. 129; *Armistead* v. *Brooke* (1857) 18 Ark. 521, 524. Contra. *Ayer* v. *Hawkins, supra; Sanborn* v. *Cole* (1891) 63 Vt. 590; *Beck* v. *Haas* (1888) 31 Mo. App. 180, on the ground that the debtor must have intended the particular application made and the consequences of an express appropriation must follow: but Missouri has since joined the weight of authority. *Wilder* v. *McAllister* (1901) 91 Mo. App. 446.

The distinction between the right of a creditor to apply a general payment to any valid debt, and the existence of the unequivocal acknowledgment releasing the debt from the operation of the Statute, is recognized and correctly applied in the principal case.

CORPORATIONS—CONSOLIDATION—STOCKHOLDER'S RIGHT TO OBJECT.—The plaintiff purchased stock in the defendant company, whose amended certificate of incorporation permitted it to consolidate with another corporation. *Held,* that as the amendment had been made previous to the plaintiff's purchase, he had no right to object to the proposed consolidation. *Colgate* v. *U. S. Leather Co.* (N. J. 1907) 67 Atl. 657.

The principal case rests upon the theory that governing statutes enter into and form part of every contract of stock subscription, 1 Thompson, Corps. § 346; Noyes, Intercorporate Relations § 41, and is supported by a consensus of authority. *Sparrow* v. *Evansville etc. R. Co.* (1856) 7 Ind. 369; *Jones* v. *Missouri-Edison Co.* (1905) 135 Fed. 153; *Mayfield* v. *Alton etc. R. Co.* (1902) 198 Ill. 528. It is of especial interest, however, as it indicates a preliminary question always to be determined in the numerous cases involving the right of a dissenting stockholder to object to alterations in the corporate enterprise. 7 COLUMBIA LAW REVIEW 598.

CORPORATIONS—SUBSCRIPTIONS TO STOCK PRIOR TO INCORPORATION.—The defendant subscribed to stock of a corporation to be thereafter formed. *Held,* the corporation has a right of action on the subscription; *semble,* that the subscriber was bound from the date of the subscription. *Nebraska Chicory Co. etc.* v. *Lednicky* (Neb. 1907) 113 N. W. 245. See NOTES, p. 47.

CRIMINAL LAW—ARMY—MUNICIPAL ORDINANCE.—A United States soldier was arrested and sentenced to imprisonment for sixty days for violating a municipal ordinance directed against unsanitary offenses. His commanding officer petitioned for a writ of habeas corpus in a federal court. *Held,* the writ would issue. *Ex parte Schlaffer* (1907) 154 Fed. 921.

This decision is sound in refusing to adopt the doctrine of *Ex parte Bright* (1874) 1 Utah 145, which exempts a soldier from liability for violating a municipal ordinance. The general principle is settled that in time of peace the civil law is supreme, and that a soldier, unless acting under lawful authority, is amenable to the ordinary civil courts as any other citizen, Tytler, Military Law 153; *Steiner's Case* (1854) 6 Op. Attys. Gen. 413; *U. S.* v. *Clark* (1887) 31 Fed. 710, in the absence of clear and direct language of Congress. *Coleman* v. *Tennessee* (1878) 97 U. S. 509, 514. It is no defense that imprisonment will interfere with his military duties. *Ex parte McRoberts* (1879) 16 Ia. 600. The statute requiring commanding officers to deliver up soldiers guilty of crimes against person or property, Rev. Stat. U. S. § 1342, was intended solely as an aid to the civil authorities, *Coleman* v. *Tennessee, supra,* and contrary to the opinion in *Ex parte Bright, supra,* obviously implies no exemption from liability for other offenses. The decision implies that the minimum sentence must be imposed on soldiers, else it is wholly void, which is unsupportable on principle or authority; or that the sentence was unusually severe: and for this cause a sentence cannot be reviewed. *Cummins* v. *People* (1879) 42 Mich. 142.

CRIMINAL LAW—STATUTE OF LIMITATIONS—NEW YORK CODE OF CRIMINAL PROCEDURE.—The indictment and proof both showed that more than the period of limitation had run before the finding of the indictment. The defendant did not refer to the Statute of Limitations on the trial, but moved to dismiss at the close of the People's case, and for a new trial, after verdict, on the ground that the evidence did not prove a crime, and also in arrest of judgment; all of these motions were denied. *Held,* the defendant could not suggest the defense of the Statute of Limitations for the first time on appeal. *People* v. *Blake* (N. Y. 1907) 38 N. Y. Law Jour., No. 30.

In New York an indictment need only allege any time prior to the date of its finding; Code Cr. Pro. § 284, subd. 5; and since the criminal Statute of Limitations, C. Cr. P. §142, contains certain exceptions, C. Cr. P. § 143, the objection cannot be taken by demurrer, C. Cr. P. § 323; *People* v. *Durrin* (1884) 2 N. Y. Cr. 328, nor by motion in arrest of judgment, C. Cr. P. §§ 331, 467; *People v. Van Santvoord* (N. Y. 1821) 9 Cow. 655, but is raised under the plea of not guilty. C. Cr. P. § 332; *U. S.* v. *Cook* (1872) 17 Wall. 168. Notwithstanding the statements of text-writers that a barred offense is no crime, Whart., Cr. Pl. & Pr. § 316, the Statute of Limitations in New York, at least, is an affirmative defense, which should be specifically brought to the court's attention by an appropriate motion or request to charge. *People* v. *Austin* (N. Y. 1901) 63 App. Div. 382. This gives the prosecution an opportunity to prove matters to take the offense out of the Statute. Cf. *Osgood* v. *Toole* (1875) 60 N. Y. 475. Although in a criminal action certain fundamental defects may be availed of at any time, *People* v. *Bradner* (1887) 107 N. Y. 1, yet ordinarily some appropriate step must be taken in the trial court, *People* v. *Huson* (1907) 187 N. Y. 97, and an appellate court cannot be asked to piece out a defense from separated facts in the record. *McDonald* v. *Mining Co.* (1859) 13 Cal. 220, 239. The tendency of the New York courts is to require timely, specific and proper objections, and to prevent the raising of new issues on appeal. *People* v. *Wiechers* (1904) 179 N. Y. 459; cf. *Boughn* v. *State* (1895) 44 Neb. 889.

EQUITY—CONSULS—PROTECTION OF ALIENS.—The defendant corporation was carrying on a life insurance business not authorized by its charter, using the name of the Emperor of Austria as part of its corporate name, thereby inducing ignorant Austrian immigrants to deal with it under the belief that in this country as in Austria the use of the Emperor's name showed that the business was under his special patronage. *Held*, that at the suit of the consul, under the treaty between the United States and the Emperor of Austria ratified June 27th, 1871, an injunction would issue against the use of the Emperor's name. *Von Theodorovich* v. *Franz Josef Beneficial Ass'n* (1907) 154 Fed. 911.

The treaty provides that consuls "may in the exercise of their duties apply" to the courts "for the purpose of protecting the rights of their countrymen." These rights, undoubtedly, must be rights recognized by the laws which the court applied to may enforce. No one of these immigrants individually, nor a number of them collectively could have obtained this injunction, although they might seek a rescission of their contract on the ground of fraud, *Higgins* v. *Crouse* (1892) 63 Hun 134, or certainly damages at law. *Henry* v. *Dennis* (1901) 95 Me. 24; *Comm.* v. *Call* (1839) 21 Pick. 515, 523. The action most nearly analogous is that in which the Attorney-General is allowed to protect the people from conditions injurious to health or safety and the property of the people generally. *People* v. *Oakland Water Front Co.* (1897) 118 Cal. 234; *People* v. *Tweed* (N. Y. 1872) 13 Abb. Pr. N. S., 25, 73; *Att'y-Gen'l* v. *Steward and Taylor* (1869) 20 N. J. Eq. 415; and see *Att'y-Gen'l* v. *City of Salem* (1869) 103 Mass. 138, 140. Here, however, the gravamen is deception. Cases of injunction against unfair competition are not analogous, for although the public are deceived, the action is not brought in their behalf. 7 COLUMBIA LAW REVIEW 120; *James* v. *James* (1872) L. R. 13 Eq. 421. The action in the principal case seems anomalous, but inasmuch as it involves the protection of property rights, *The Emperor of Austria* v. *Day* (1860) 3 De Gex, F. & J. 217, it seems a fit case for equitable intervention, especially in view of the evident scope and purpose of the treaty. The court cites no authority in support of its position, although it refers without citing to "a similar bill entertained some two years ago."

EQUITY—INJUNCTION—PROPRIETARY RIGHT IN LETTERS.—The defendants, possessing letters written by a well-known painter, proposed to use, in the

publication of a biography, information derived from them concerning his habits, character, opinions, and doings. *Held*, the plaintiff, his executrix, was not entitled to an injunction. *Philip* v. *Pennell* (1907) 76 L. J. Ch. 663.

The common law gave to an author a proprietary right in his production, originally perpetual, but superseded by statutory copyright after publication, *Donaldson* v. *Beckett* (1774) 4 Burr. 2408, enforceable in equity by injunction, *Webb* v. *Rose* (1732) cited 4 Burr. 2330; *Forrester* v. *Waller* (1741) cited 4 Burr. 2331, defined by Lord Mansfield as an incorporeal right to the sole printing of a set of intellectual ideas communicated by a set of words. *Millar* v. *Taylor* (1769) 4 Burr. 2303. Another in rightful possession of the manuscript might make any use of it but multiplying it in print. *Millar* v. *Taylor, supra; Duke of Queensbury* v. *Shebbeare* (1758) 2 Eden 329. Following out the spirit of this common law copyright, it is held to be infringed also by substantial reproduction or colorable imitation. *Caird* v. *Simes* (1887) 12 App. Cases 326; *Aronson* v. *Baker* (N. J. 1887) 16 Stew. Eq. 365. But a fair use not amounting to substantial reproduction is not an infringement. *Abernethy* v. *Hutchinson* (1824) 3 L. J. Ch. 209; *Burnell* v. *Chown* (1895) 69 Fed. 993. The proprietary right of a writer in letters is an extension of the common law copyright, first applied to letters of literary merit, *Pope* v. *Curl* (1741) 2 Atk. 342, later to letters of any description. *Gee* v. *Pritchard* (1818) 2 Swanst. 402; *Woolsey* v. *Judd* (N. Y. 1855) 4 Duer 379. It is identical with the right of an author in unpublished manuscript. *Grigsby* v. *Breckenridge* (Ky. 1867) 2 Bush 480. The principal case seems sound in refusing to enlarge the right beyond the suppression of publication, literal or in paraphrase.

EQUITY—INJUNCTION—UNCLEAN HANDS.—The plaintiff seeks an injunction to compel the defendant to keep secret a process for detinning which had been placed in trust with him. Unknown to the plaintiff, his agent had pirated the process and the user of it constituted a fraud. *Held*, an injunction would issue. *Vulcan Detinning Co.* v. *American Can Co.* (N. J. 1907) 67 Atl. 339. See NOTES, p. 40.

EQUITY—TRUSTS—DUTY OF BANK.—A bank paid out trust funds to the trustee knowing that the trustee was committing a breach of trust by improper withdrawal of the funds. *Held*, the bank was liable to the cestui. *American Nat. Bank* v. *Fidelity etc. Co.* (Ga. 1907) 58 S. E. 867.

A bank cannot pay to the trustee knowing that he is withdrawing the funds in breach of his trust and thus facilitate such breach, *Duckett* v. *Mechanics Bank* (1898) 86 Md. 400; *Bundy* v. *Monticello* (1882) 84 Ind. 119; *Manhattan Bank* v. *Walker* (1880) 130 U. S. 267; *Commercial Bank* v. *Jones* (1857) 18 Tex. 811, but if the bank has no knowledge of the breach of trust it cannot supervise the action of a trustee and must presume that the funds are being properly withdrawn, *Randolph* v. *Allen* (1896) 73 Fed. 23; *Goodwin* v. *American etc. Bank* (1881) 48 Conn. 550; *Munnerlyn* v. *Bank* (1891) 88 Ga. 333; *State Bank* v. *Reilly* (1889) 124 Ill. 464, 470, except where the circumstances are such that the bank should have been put upon its guard. *Shaw* v. *Spencer* (1868) 100 Miss. 382; *Duncan* v. *Jaudon* (1872) 15 Wall. 165; see, *Field* v. *Schieffelin* (N. Y. 1823) 7 Johns. Ch. 150. It would seem that the bank should be a party to the breach of trust in order that liability should accrue, see, *Gray* v. *Johnston* (1868) L. R. 3 H. L. 1; *Keane* v. *Roberts* (1819) 4 Madd. 332, 356, and therefore that the bank should pay to the trustee providing that at the time of the withdrawal of the funds the trustee is acting within the legitimate course of his duties, even though the bank had reasonable grounds to believe that the trustee would subsequently commit a breach of his trust, since at the time of payment the bank was but properly exercising its duties and was not a party to an illegal transaction.

EVIDENCE—VERBAL ACTS—DECLARATIONS BY ONE IN POSSESSION OF PROPERTY —CLAIM OF TITLE.—In a controversy between the heirs of a husband and

wife as to whether a deed purporting to convey land to said husband and wife jointly was in fact a mortgage as to the wife, evidence was offered of self-serving declarations of the husband, made while in possession of the land. *Held,* the evidence was admissible "to illustrate and qualify the possession." *Hubbard* v. *Cheney* (Kan. 1907) 91 Pac. 793. See NOTES, p. 43.

GARNISHMENT—PROPERTY SUBJECT—TORT LIABILITY.—At the time of service of a garnishment summons, a suit for personal injury was pending between the plaintiff's debtor, W., and the garnishee as defendant. Subsequently, the defendant gave W. a sight draft for $1,750 to purchase a release from the claim, although denying its liability. The defendant answered the garnishment summons and denied being indebted to W. at any time since the service. *Held,* the defendant was liable for the amount of the plaintiff's debt against W. *Lee and Anderson* v. *L. & N. Ry. Co.* (Ga. 1907) 58 S. E. 520.

The Court based its judgment upon the fact of a debt due to the plaintiff's debtor, and also upon the theory of property. The Georgia Code (1895) § 4712, provides that "all debts owing to the defendant or any property in the hands" of a third party at the time of process or before answer, are subject to garnishment. Although a claim arising from tort may be considered as property of the injured party, *Banks* v. *McCandless* 119 Ga. 793, 798, the garnishment of the tort-feasor cannot hold it, since the property is not in his hands. Code § 4712, *supra.* But the code provision is broad enough to include under debts, "everything becoming due" by the garnishee to the debtor; such garnishment statutes shall be liberally construed, *Dunning* v. *Owen* (1817) 14 Mass. 157, and those of some States expressly provide thus. Code Iowa (1897) § 3446; *Davis* v. *Mahany* (1875) 38 N. J. L. 104. And so, upon a sale for cash, where payment is a condition to title passing, *Bergan* v. *Magnus & Co.* (1896) 98 Ga. 514, strictly speaking no debt arises, yet if the purchaser's non-payment was due to service of garnishment upon him, this would probably shield him in an action for the non-payment. See *Paul* v. *Reed* (1872) 52 N. H. 136, 139.

LANDLORD AND TENANT—CONSTRUCTIVE EVICTION—ACT OF SERVANT.—The superintendent of an apartment house habitually listened to the telephone conversations of the defendant's wife, and made use of the information thus acquired frequently to insult her. Despite complaint, the landlord neglected to dismiss the superintendent, whereupon the defendant abandoned the premises. *Held,* the rent could not be recovered. *Fox* v. *Murdock* (1907) 38 N. Y. Law Jour., No. 55.

The doctrine of constructive eviction was established in an early case where the landlord harbored immoral persons near the demised premises. *Pendleton* v. *Dyett* (N. Y. 1826) 8 Cowen 727. Though criticized for a time, *Ogilvie* v. *Hull* (N. Y. 1843) 5 Hill 52, 54; *Royce* v. *Guggenheim* (1870) 106 Mass. 201, 205, the doctrine has persisted, *Cohen* v. *Dupont* (N. Y. 1848) 1 Sandf. 260; *Sully* v. *Schmitt* (1895) 147 N. Y. 248; 5 COLUMBIA LAW REVIEW 548, and has been applied to the maintenance of a long series of minor nuisances, *Cohen* v. *Dupont, supra,* or of single major nuisances. *Duff* v. *Hunt* (1891) 16 N. Y. Supp. 163; *Tallman* v. *Murphy* (1890) 120 N. Y. 345; *Wade* v. *Herndl* (1906) 127 Wis. 544. That the landlord is under a greater duty with respect to his servants than with respect to his tenants would seem clear. The retention of an improper servant may, therefore, constitute a constructive eviction; that is, when the servant's acts constitute a material impairment of the tenant's beneficial enjoyment of the premises, *Humes* v. *Gardner* (N. Y. 1898) 22 Misc. 333, and from the landlord's knowledge thereof an intention on his part to evict may be implied. *Haas* v. *Ketcham* (1904) 87 N. Y. Supp. 411. The courts have properly refused to extend the doctrine to extreme limits; *Seaboard Realty Co.* v. *Fuller* (N. Y. 1900) 33 Misc. 109; and the proof in the principal case would not seem to justify its application.

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—STREET SPRINKLING.—Abutting property owners were assessed by virtue of an ordinance for street sprinkling done by the city. *Held*, the statute authorizing the ordinance was unconstitutional. *Stevens* v. *City of Port Huron* (Mich. 1907) 113 N. W. 291.

Although an improvement to real estate implies durability, *City of Chicago* v. *Blair* (1894) 149 Ill. 310; *Kansas City* v. *O'Connor* (1900) 82 Mo. App. 655; cf. *Sears* v. *Boston* (1899) 173 Mass. 71, yet special benefit to the property holder by whatever means accomplished would seem on equitable grounds to justify a special assessment. *Reinken* v. *Fuering* (1891) 130 Ind. 382; *State* v. *Reis* (1888) 38 Minn. 371; *Pettit* v. *Duke* (1894) 10 Utah 311; cf. *N. Y. Life Ins. Co.* v. *Prest* (1896) 71 Fed. 815. Improvements such as cleaning snow, slush, or mud from the sidewalks may justify special assessment not only as conferring special affirmative benefits, cf. *Carthage* v. *Frederick* (1890) 122 N. Y. 208, but also as relieving the abutter from a duty with which he might otherwise be burdened under a police regulation. Cf. *In re Petition of Goddard* (1835) 16 Pick. 504; *Carthage* v. *Frederick, supra.* But to impose on the abutter the duty of allaying the dust on the street would be pushing the police power to the verge of unconstitutionality; and the affirmative benefit is so slight as to have been questioned. *City of Chicago* v. *Blair, supra.* The combined affirmative and negative benefits, therefore, but barely justify other courts in reaching a result different from the principal case. *State* v. *Reis, supra; Reinkin* v. *Fuering, supra.*

NUISANCE—PERCOLATING WATERS.—The defendant caused the water of a running stream to percolate into the plaintiff's land. *Held*, it was for the jury to determine whether the defendant's use was reasonable, and due care had been exercised. *Moore* v. *Berlin Mills Co.* (N. H. 1907) 67 Atl. 578.

The doctrine that one may cause damage to another because of a reasonable and careful use of one's property, *Booth* v. *Rome R. R.* (1893) 140 N. Y. 267, is of limited application. *Pixley* v. *Clark* (1866) 35 N. Y. 520. Admittedly, it has no reference to trespass; *Hay* v. *Cohoes Co.* (1849) 2 N. Y. 159; and it has, in fact, been extended only to minor harms arising from smoke, dust, or noise, though accompanied by a slight physical invasion with particles of matter; *Rhodes* v. *Dunbar* (1868) 57 Pa. St. 274; cf. *Campbell* v. *Seaman* (1876) 63 N. Y. 568; or to a merely temporary use without physical invasion. *Booth* v. *Rome R. R., supra.* But ordinarily any use of property entailing an infringement of another's possession constitutes a nuisance; *Mairs* v. *Manhattan Real Est. Ass.* (1882) 89 N. Y. 498, 505; and while the line between dust and stones, vapor and water, is merely one of degree, it is this line which must be drawn to preserve the rights of property owners. As the principal case shows a permanent physical invasion, the inquiry into its reasonableness would seem unsound and this has been the conclusion reached in other jurisdictions on similar facts. *Pixley* v. *Clark, supra; Ellington* v. *Bennett* (1877) 59 Ga. 286; *Wilson* v. *Bedford* (1871) 108 Mass. 261; contra, *Quinne* v. *Ry. Co.* (1884) 63 Ia. 570; *Esson* v. *Wattier* (1893) 25 Ore. 7.

PARTNERSHIP—GOOD WILL—VALUE.—A surviving partner, who later qualified as executor, with the tacit assent of his co-executor appropriated the good will of the partnership which was engaged in merchandizing imported plant products. The accounting was contested by the residuary legatee. *Held*, the executors must account for the good will, calculated as two years' average net profits. *In re Silkman* (1907) 105 N. Y. Supp. 872.

The good disposition of customers toward an established business, *Trego* v. *Hunt* (1896) 65 L. J. Ch. 1; *Johnson* v. *Robert* (1899) 159 N. Y. 70, is regarded as a partnership asset. *Slater* v. *Slater* (1903) 175 N. Y. 173;

3 COLUMBIA LAW REVIEW 496. But, in some jurisdictions the good will on the death of a partner is considered merely the probability of old customers resorting to the old place, *Griffith* v. *Kirley* (1905) 189 Mass. 522, 527, and the surviving partner may canvass these. *Hutchinson* v. *Nay* (1905) 187 Mass. 262; contra, *David* v. *Matthews* [1899] 1 Ch. 378. Good will being so easily dissipated, the surviving partner is held strictly accountable; *Rammelsberg* v. *Mitchell* (1875) 29 Oh. St. 22; *Tenant* v. *Dunlop* (1899) 97 Va. 234; cf. *Hutchinson* v. *Nay, supra;* but its value varies necessarily with its transferability and the legal protection afforded it. Commercially it is valuable as swelling the net profits, and proportionately to the length of time it will continue to have that effect. Hence, while no uniform rule for measuring good will can be adopted, *Von Au* v. *Magenheimer* (N. Y. 1906) 115 App. Div. 84, the proof of net profits together with the circumstances of the business furnishes adequate evidence. *Kirkman* v. *Kirkman* (N. Y. 1898) 26 App. Div. 395. While any rough method of attaining the result must be inaccurate, yet the net profits for an appropriate number of years has been selected as the gauge of value; *Mellersh* v. *Keen* (1860) 28 Beav. 45; *Page* v. *Ratcliff* (1896) 75 L. T. N. S. 71; and is, perhaps, the only test a jury can apply.

PLEADING AND PRACTICE—CROSS-BILLS—FEDERAL JURISDICTION.—A bill to foreclose a mortgage on real property was filed by a British subject against citizens of California. The N. C. Investment Trust, Ltd., also a British subject, intervened and filed a cross-bill for the foreclosure of a junior mortgage, against the above defendants and made one Powell, a British subject, also a defendant to the cross-bill. The original defendants demurred to the cross-bill. *Held*, the demurrer would be sustained. *Newton* v. *Gage* (1907) 155 Fed. 598.

Where a cross-bill brings in new parties, who as original parties would have defeated the jurisdiction of the Federal courts on the ground of the non-diversity of citizenship, the jurisdiction is thereby ousted. *Shields* v. *Barrow* (1854) 17 How. U. S. 130, 145. The court in the principal case notes two exceptions; where the new party claims an interest in property or a fund, of which the court holds possession, *Krippendorf* v. *Hyde* (1884) 110 U. S. 276, and where such party represents an interest already before the Court. *Society of Shakers* v. *Watson* (1895) 68 Fed. 730, 736. The meaning of the latter phrase is not clear. It may describe the case of an executor who comes in to represent his testator, who has died pending the suit; or it may refer to an interest of the intervenor which is necessarily involved in the principal litigation, although still separable from that of the original parties, so as to permit a decree; *Society of Shakers* v. *Watson, supra;* or it may mean that the new party possesses an interest which is identical with an interest of one of the principal parties. *Phelps* v. *Oaks* (1886) 117 U. S. 236. The last is the broadest construction and if applied literally, the exception might be used as a device to let in parties barred by the diverse citizenship requirement. A qualification is necessary and may be thus stated: the intervening party must not be one who was an indispensable party to the original bill. Intervention is "a different proceeding from that of making parties to the main controversy." *Gregory* v. *Pike* (1895) 67 Fed. 837, 846.

PLEADING AND PRACTICE—LIMITATIONS—AVAILABILITY OF STATUTE TO ONE CREDITOR AGAINST ANOTHER.—Upon the administration of a decedent's estate, and a reference therein to take proof of the decedent's debts, one P. sought to prove a note barred by limitation. The administrator did not plead the Statute thereto. *Held,* another creditor might raise this objection upon the reference. *Pendley* v. *Powers* (Ga. 1907) 58 S. E. 653.

As a general rule, the Statute of Limitations is a personal defense, which may be pleaded or waived at the debtor's option, *Brigham* v. *Fawcett* (1880) 42 Mich. 542, and even a creditor whose claim is not barred cannot object to a preferential payment of a barred obligation. *Sheppard's*

Estate (1897) 180 Pa. St. 57. But where the estate of a decedent or an insolvent is administered in equity or in bankruptcy, each creditor, having an interest to increase his *pro rata* share in the fund in court, may object to any other's claim, *Shewen* v. *Vanderhorst* (1831) 1 Russ. & Myl. 347; *Woodyard* v. *Polsley* (1878) 14 W. Va. 211, and cannot be affected by the debtor's failure to plead the Statute. *Woods* v. *Woods* (1897) 99 Tenn. 50; *McCartney* v. *Tyrer* (1897) 94 Va. 198. The distinction seems to be, that although the Statute cannot be used collaterally to impeach an obligation, *Miller* v. *R. Co.* (1893) 55 Fed. 366, yet wherever a third party is in a position to plead the debtor's defenses, he, and not the debtor, has the option to plead or waive the Statute. *Walker* v. *Burgess* (1898) 44 W. Va. 399.

PLEADING AND PRACTICE—SUMMONS BY PUBLICATION—SITUS OF DEBT OF FOREIGN CORPORATION DOING BUSINESS IN NEW YORK.—A policy of insurance, issued by a foreign corporation doing business in New York to a resident of New York, was assigned to a resident of that state. In an action by the executor of the assignee against the insurance company and the non-resident beneficiaries under the policy, an order was granted for service by publication upon said beneficiaries on the ground that the action was brought to establish and enforce a lien upon specific personal property within the state. Code, § 438, sub. 5. *Held,* the order was valid. *Morgan* v. *Mutual B. L. Ins. Co.* (N. Y. 1907) 82 N. E. 438.

Assuming that a debt is "specific personal property" within the meaning of the Code, the decision in the principal case involves the remaining point of the situs of the debt. The rule that the state which charters a corporation is its domicil with reference to the situs of its debts was laid down at a time when there only could it be sued or served with process. *N. E. Mut. Life Ins. Co.* v. *Woodworth* (1884) 111 U. S. 138, 146. The Federal courts make the right to a garnishment or attachment depend upon the right of the creditor to enforce his claim in the particular jurisdiction—reasoning that a debt exists by reason of the presence of the debtor coupled with the fact that the law of the place will make him pay. *Chicago etc. R. R.* v. *Sturm* (1899) 174 U. S. 710; *Harris* v. *Balk* (1905) 198 U. S. 215; *L. & N. R. R.* v. *Deer* (1906) 200 U. S. 176; 7 COLUMBIA LAW REVIEW 544. Although this doctrine is discontenanced in the attachment cases in New York, *Plimpton* v. *Bigelow* (1883) 93 N. Y. 592; *Douglas* v. *Phœnix Ins. Co.* (1893) 138 N. Y. 209, the reasoning is adopted in the principal case and the same rule applied as in cases involving the situs of debt-assets for administration, *Sulz* v. *Mut. R. S. L. Ass'n* (1895) 145 N. Y. 563, and of debts subject to transfer tax. *Matter of Gordon* (1906) 186 N. Y. 471.

QUASI-CONTRACTS—SERVICES IN EMERGENCY.—A physician rendered services to the intestate who was injured in an accident and who never recovered consciousness. *Held,* the plaintiff could recover the value of his services from the estate. *Cotnam* v. *Wisdom* (Ark. 1907) 104 S. W. 164.

At common law physicians were presumed to practice for honorarium and not for compensation, *Chorley* v. *Bolcot* (1791) 4 T. R. 317, though the presumption did not apply to surgeons. *Battersby* v. *Lawrence* (1841) 41 E. C. L. 155; *Little* v. *Oldaker* (1842) 41 E. C. L. 205. The rule was abolished by statute, see *Gibbon* v. *Budd* (1863) 2 H. & C. 92, and never obtained in the United States. *Judah* v. *M'Namee* (Ind. 1833) 3 Blackf. 269; *Graham* v. *Gautier* (1858) 21 Tex., 111, 117; *McPherson* v. *Cheadell* (N. Y. 1840) 24 Wend. 15. Ordinarily no recovery may be had for services rendered without request, for such acts are regarded as officious, *Quin* v. *Hill* (N. Y. 1886) 4 Dem. 69; *Boston Ice Co.* v. *Potter* (1877) 123 Mass. 28; *Bartholomew* v. *Jackson* (N. Y. 1822) 20 Johns. 28; *Glenn* v. *Savage* (1887) 14 Ore. 567, but this does not obtain where the act is necessary to avoid consequences in which the public is interested, *Rogers* v. *Price* (1829) 3 Y. & Jer. 27; *Ambrose* v. *Kerrison* (1851) 10 C. B. 776; *Gould* v. *Moula-*

han (1895) 53 N. J. Eq. 341, such as the acts of physicians in emergencies, *Sherman's Estate* (1889) 6 Pa. Co. Ct. 225; see *Meyer* v. *Knights of Pythias* (1904) 178 N. Y. 63, but the services must not have been intended to be gratuitous. *Osborn* v. *Governors of Guy's Hospital* (1726) 2 Str. 728; *Dye* v. *Kerr* (N. Y. 1851) 15 Barb. 444. The fact that the intestate had lost capacity to contract because of the accident, and therefore could not have made a binding contract for the plaintiff's services, does not affect the right to recover, since the obligations enforced under the doctrine of quasi-contract are those imposed by law irrespective of intention or power to enter into contract. *Sceva* v. *True* (1873) 53 N. H. 627; *Sawyer* v. *Lufkin* (1868) 58 Me. 308; *Trainer* v. *Turnbull* (1886) 141 Mass. 527; *Earle* v. *Reed* (Mass. 1845) 10 Met. 387.

Real Property—Deeds—Omission of Grantor's Name.—A life tenant and two remaindermen of a parcel of land signed and sealed a deed purporting to convey an estate in fee, but in which only the life tenant was mentioned as grantor. *Held*, the deed conveyed the interests of the remaindermen. *Sterling* v. *Park* (Ga. 1907) 58 S. E. 828.

A deed must contain words sufficient to set forth the agreement of the parties. Shep. T. 55. Accordingly, the grantor must be described by name as a party to the deed. Co. Litt. 35 b. Sealing and delivering is not sufficient to make one a party. *East Skidmore* v. *Vaudstevan* (1586) Cro. Eliz. 56. It has been held that where a party's name is mentioned in another part of the instrument and his intention to join in the conveyance clearly appears, his interest passes, though his name does not appear in the granting clause. *Tretheway* v. *Ellesdon* (1690) 2 Vent. 141; *Lord Say and Seal's Case* (1711) 10 Mod. 40. But in the principal case there appeared no mention of the remaindermen or of their intention to convey. It is difficult to see, therefore, how their interests could be held to have passed without a disregard for the essentials of a valid deed. This view is supported by the great weight of authority in this country. *Catlin* v. *Ware* (1812) 9 Mass. 209; *Agricultural Bank* v. *Rice* (1846) 4 How. U. S. 225; *Stone* v. *Sledge* (1894) 87 Tex. 49, and cases cited. In accord with the principal case see *Elliott* v. *Sleeper* (1823) 2 N. H. 525.

Receivers—Contract—Nature.—The receiver of an insolvent corporation sold property under the order of the court. The purchaser asked to be relieved from his purchase because of failure of title, and for a return of deposit, with interest, and costs of examination of title and of the proceedings. *Held*, that he would be relieved from his purchase and the deposit would be repaid, but that the other items claimed would not be allowed, as he could not claim damages for breach of contract. *People* v. *New York Building-Loan Banking Co.* (N. Y. 1907) 82 N. E. 184. See Notes, p. 46.

Sales—Statute of Frauds—Acceptance and Receipt by Vendee in Possession.—The defendant orally agreed with the plaintiff to purchase lumber belonging to the plaintiff already piled on the former's land. *Held*, assuming the defendant to have been in possession of the lumber, there was no acceptance and receipt to satisfy the Statute of Frauds. *Silkman Lumber Co.* v. *Hunholz* (Wis. 1907) 112 N. W. 1081.

The Statute of Frauds requires acceptance and receipt as evidence of the existence of the oral contract. *Shindler* v. *Houston* (1848) 1 N. Y. 261. To constitute a sufficient acceptance there must be at least some dealing with the goods amounting to a recognition of the contract. *Page* v. *Morgan* (1885) 15 Q. B. D. 228. For receipt there need not be a physical transfér of possession, provided there is evidence showing a change in the character of the possession, as where the vendee constitutes the vendor a bailee of the property. *Marvin* v. *Wallis* (1856) 6 E. & B. 726. It is clear that the vendee's bare continuance in possession is neither evidence of acceptance nor of a change in the nature of the possession amounting

to a receipt. Some dealing with the goods must appear inconsistent with the continuance of the former possession, *Lillywhite* v. *Devereux* (1846) 15 M. & W. 285, and evidencing an intention to accept pursuant to the contract. *Dorsey* v. *Pike* (1889) 50 Hun. 534.

TORTS—DECEIT—SELLING PRICE.—The defendant, acting in conjunction with a real estate agent, misrepresented the price for the land fixed by the owner, and induced the plaintiff to purchase. *Held,* such statements were not material allegations of fact on which the purchaser had a right to rely. *Bosley* v. *Monahan* (Ia. 1907) 112 N. W. 1102.

Statements of value by a vendor are generally expressions of opinion; *Parker* v. *Moulton* (1873) 114 Mass. 99; *Noetling* v. *Wright* (1874) 72 Ill. 390; *Ellis* v. *Andrews* (1874) 56 N. Y. 83; as are statements as to the price paid by or offered to the vendor. *Cole* v. *Smith* (1889) 26 Colo. 506; *Hemmer* v. *Cooper* (Mass. 1864) 8 Allen 334; *Bishop* v. *Small* (1874) 63 Me. 12. Other courts on the contrary hold that such statements are material representations of fact, for the falsity of which the vendee may have his action. *Dorr* v. *Cory* (1899) 108 Ia. 725; *Stoney Creek Woolen Co.* v. *Smalley* (1896) 111 Mich. 321; *Fairchild* v. *McMahon* (1893) 139 N. Y. 290, distg. *Ellis* v. *Andrews, supra.* When the parties sustain fiduciary relations so that the party has a right to rely on the statements; *Smith* v. *Patterson* (1873) 33 Oh. St. 70; or the parties have not equal means of knowledge or are on unequal terms; *Cox* v. *Gerkin* (1890) 38 Ill. App. 340; *Rober Iron Co.* v. *Trout* (1887) 83 Va. 397; statements innocent under other circumstances are held fraudulent. *Cole* v. *Smith, supra.* Under either rule the principal case was correctly decided, for it is of common knowledge that prices given to real estate agents are not meant as accurate statements of value to be relied upon, and to extend recovery for misrepresentation to such cases would violate the principles of reasonableness.

WILLS—"DYING WITHOUT ISSUE"—DETERMINABLE FEE.—A testator devised and bequeathed the residue of his real and personal estate as follows: "to my two grand-children, M. and J., share and share alike; and in case both of my grand-children should die without heirs of their bodies living or in being at the time of their death, * * * then it is my will that both shares shall go to my son John Fifer absolutely." *Held,* that the death of the grand-children provided for, was, by the testator's intent, a death either before or after the testator's death. and if they survived him, they took a determinable fee, subject to an executory devise over to John Fifer. *Fifer* v. *Allen* (Ill. 1907) 81 N. E. 1105. See NOTES, p. 37.

BOOK REVIEWS.

CHARLES S. BULKLEY, *Editor-in-Charge.*

SELECTED ESSAYS ON ANGLO-AMERICAN LEGAL HISTORY. By Various Authors. Boston: Little, Brown & Company. 1907. Vol. I. pp. ix, 847.

This very handsomely printed book is the first of three volumes of essays upon topics in our legal history, which have been selected and edited by a committee of the Association of American Law Schools. The second volume is to appear in 1908, while volume three is to be ready in 1909. The editing committee consists of Professors Freund, of the University of Chicago, Mikell, of the University of Pennsylvania, and Wigmore, of Northwestern University—an admirable combination for the performance of the work in hand. Dean Wigmore, the chairman, has urged the desirability of such a publication for several years, and is to be congratulated upon winning the Association to the hearty support of his views.

In its report of 1906, the Committee gave the following as some of the prime reasons for this publication: "The study of the history of the various branches of law is now much obstructed by the virtual inaccessibility of a great amount of important material, which exists in print, but is through several circumstances practically going to waste. The chief circumstance is that it consists of articles scattered through serial journals of from twenty to forty volumes, of which only one or two sets are usually kept in any library. The result is that when a class of fifty or a hundred students is set to read an article of prime value in some subject, one of two things happens: either the bulk of the class becomes discouraged at finding the volume already taken out by some enterprising student; or, if they persist, and the bulk of the class manages to read the article, it is worn out and becomes illegible in a year or two, and is thereby useless, unless the set to which it belongs is entirely or partly replaced at great expense. Between these two dilemmas very little of such reading comes to be done."

Hence the committee has undertaken "to assemble in one convenient form those essays which are of permanent value, and would otherwise fail of the constant and wide perusal which they deserve, etc." In the execution of this plan the editors believe that they have furnished "a fairly complete skeleton of legal history since Norman times—a compact working library to illumine in outline the period of the last six centuries."

In this belief we concur, after a careful perusal of the present volume and of the table of contents of the second and third volumes. We concur, too, in the opinion of the committee that every law school should have several sets of these essays upon its shelves; and that, if it has them, the amount of voluntary reading by their students will be greatly increased. Nor do we entertain any doubt that these volumes will "help to stimulate a deeper and wider knowledge of the present meaning of our law as seen in the light of the past."

At the same time we are glad to note that the editors do not advocate the addition of a course in antiquarian legal research to the present law-school curriculum. Nor do they enter a plea for the extension of the law-

school course beyond the now generally accepted period of three years; either by a demand for preparatory training in legal history, or for the adoption of the historical method in the study of each course. These essays will serve the best purpose if they are employed as a stimulus to the thorough mastery of each course pursued by students in the Law School, and as a means of fine legal culture. Every zealous and capable student should be encouraged to supplement his class-room drill with excursions into the more alluring fields of legal history. If, however, his life work is to consist in giving wise advice to clients and in successfully defending their legitimate interests, those excursions must not be made in a sybaritic spirit. They must be held in subordination to his main purpose of equipping himself as a sound lawyer and sane counselor.

The contents of the present volume are fairly characterized by the title "General Surveys." Part I deals with the period before the Norman Conquest and is made up of essays by Maitland, Jenks and Pollock. Part II covers the period from the Norman Conquest to the eighteenth century. Part III is devoted to the American Colonial Period, and possesses peculiar interest for American lawyers. The essays in Part IV relate to the expansion and reform of the law in the nineteenth century, while Part V presents a sketch of the bench and bar from Norman times to the nineteenth century.

Of the twenty-one selections which make up this attractive volume we cannot speak in detail, and we have no thought of instituting invidious comparisons between them. All can be read with profit, and each contains a value of its own. If we were asked to advise any change in the contents, our suggestion would be to substitute for the last paper, entitled "An American Law Student of a Hundred Years Ago," by James Kent, that distinguished author's Introductory Lecture to the first course which he gave at Columbia, and which was reprinted in this Review for May, 1903. We feel confident that if the Chancellor could be consulted on the subject his judgment would concur with ours.

Problems of International Practice and Diplomacy, with Special Reference to The Hague Conferences and Conventions and other General International Agreements. By Sir Thomas Barclay. London: Sweet & Maxwell, Ltd. Boston: Boston Book Company. 1907. pp. xix, 383.

Though the results of the second conference at The Hague have fallen so far short of its programme and even of the anticipations of many not over-sanguine spectators, yet the value of such a book as Sir Thomas Barclay's Problems of International Practice and Diplomacy, despite its evident preparation in view of the conference, is nevertheless not any the less; in fact, it is greater now than if the conference had adopted and incorporated into international law the solutions therein suggested, for in that event its usefulness would be over, while at present it stands as the embodiment of lofty ideals towards which the nations may yet for many years continue to struggle. It is not by any means intended to suggest that Sir Thomas Barclay's solutions are not eminently practical, only that they are pushed

much further than the nations are at present willing to go; they never lose sight of the reciprocal need of the states to regard enlightened self-interest nor do they tend to sacrifice common-sense considerations to excessive humanitarianism. And yet the solutions here proposed to many of the pressing problems of international law would do much to advance the humaneness of international relations in time of war.

Many of the most advanced advocates of the movement to limit the horrors of war by eliminating its occasions will, however, be constrained to reject some of the solutions. For example, a draft Arbitration Treaty is suggested that is designed to solve the difficulties that have arisen in connection with arbitration in those cases where "national honor" and "vital interests" are involved. And one is constrained to answer "yes" to the question "Is there reason to suppose that as between Great Britain and France any difficulty involving 'national honor' or a 'vital interest' would not now be solved by amicable methods?" (p. ix).

The author feels no fear that manliness of character will be undermined by peace, for he believes modern democracy is extremely sensitive to every breath of feeling, and that "the root of human reason gains strength from every gust; and if Western peoples grow more peaceful because more reasonable, this can be no parallel to the historic cases of sybarite or subject peoples emasculated by long periods of non-responsibility." Moreover, he does not regard it as "mere optimism" to talk seriously of a "League of Peace" or a "World Council"; it is presaged in such gatherings as the Berlin Conference on West African affairs, that of Algeciras on the settlement of Morocco, the conferences at The Hague and the Pan-American conferences. "This coöperation among nations for the preservation, on the one hand, of order and law, and on the other, of good-will and peace, shows that it is no mere dream to think that the conferences at The Hague may become periodical, extend the range of their objects, and develop into a world council."

It is recognized, however, that the permanent success of such conferences is dependent upon the development of reciprocal good-feeling among the nations, to which he justly regards King Edward VII as having contributed so largely.

In addition to some twenty odd problems whose solution is attempted there are a number of suggested draft treaties and clauses and appendices containing some of the most important documents of recent times that are of especial interest to students of international law, and the whole is followed by an alphabetical index.

The book will prove altogether useful and helpful to general reader or student who desires to be brought abreast of the times in all that pertains to international law save in respect of the small changes brought about by the Second Conference at The Hague.

A Treatise on Suits in Chancery: Setting Forth the Principles, Pleadings, Practice, Proofs and Processes of the Jurisprudence of Equity; and Giving Numerous Illustrative Forms of Pleadings, Writs, Orders, Reports, Decrees and Other Proceedings in Suits in Chancery from Their Beginning to Their Ending; Besides Many Practical Sug-

GESTIONS FOR SOLICITORS AND MASTERS. By HENRY R. GIBSON, A.M., LL.D., Chancellor of the Second Chancery Division of Tennessee. Second Edition; revised and enlarged by the author. Knoxville, Tenn.: Gaut-Ogden Co. 1907. pp. xx, 1203.

The scope of this book is expressed in its title. The authorities cited are mostly from the decisions of the courts of Tennessee and from standard treatises on equity. In the selection and treatment of topics emphasis is placed on those in which the average lawyer is most likely to be concerned. Little effort is made to deal with theory, but rather to give the lawyer of Tennessee a good working tool, suited to the business of a legal craftsman. As such the book is well made. The forms are numerous; the index ample; but no table of cases is given.

In discussing the history of the Court of Chancery, the relation of the Court of Chancery of Tennessee to that of North Carolina is shown, and an interesting reference is made to the influence of John Locke's Fundamental Constitution of North Carolina on the creation of that court. It is to be regretted that the limits of his book did not permit Chancellor Gibson to enlarge his account of the Colonial Courts and the growth of equity jurisdiction in Tennessee.

A DIGEST OF IMPORTANT CASES ON THE LAW OF CRIMES. By JOHN R. ROOD. Ann Arbor: George Wahr. 1906. pp. 623.

Professor Rood, of the University of Michigan, has arranged for the use of students in criminal law, a case book of distinctive and characteristic merit.

The author frankly calls it an experiment. It occupies a middle ground between the Harvard case book and the ordinary text-book of the Hornbook or Student Series. We believe, however, that the work, in its method and design, embodies many of the advantages of the most approved case book, and in the hands of a capable instrutor, can be made of far superior value to the student than the average text-book.

The cases digested far exceed the number contained in the usual case book. They have been selected, condensed and classified with exceptional discrimination and skill. The arrangement of the entire matter of the book in appropriate chapters and sections, with helpful and suggestive headnotes, affords a most useful guide to the student, and enables him to properly systematize and arrange the information he acquires as he progresses with his subject.

The table of contents at the beginning has been most carefully and elaborately planned. It constitutes in itself a most valuable and suggestive outline or skeleton of this important branch of municipal law. The general arrangement and classification is that adopted by Mr. Bishop, and followed by most American writers upon this subject.

The author has made use of nearly one thousand cases. This is about ten times the number employed in most of the case books on this subject. They are compressed into 597 pages of text, with very few notes. This has necessitated a statement of each case so condensed and abridged as practically to eliminate the distinctive quality of a case book, at least such as

are compiled after the Harvard system. Many cases are reduced to a statement of but five or six lines. Comparatively few of the cases are extended beyond two or three pages. The average space occupied in the statement of each case will be found to be considerably less than one page of text. It is doubtful, therefore, if the book will be deemed suitable by instructors who are exclusively devoted to the Harvard or case method of teaching law. Indeed, it is not a case book but a digest, as its title very properly indicates.

It would seem to be evident that this book will be regarded with more favor by teachers who are not exclusively committed to the case system. It is in many respects, however, superior to the average text-book. The propositions contained in the text can be depended upon as accurate statements of what some court of last resort has decided to be the law upon a state of facts which have been actually submitted to judicial consideration. These propositions can be readily discovered by the student, without unnecessary labor or loss of time.

They have been harmoniously grouped and classified as authorities supporting a general principle formulated by the author in a black-letter headnote at the beginning of each chapter and section.

We venture to suggest that the value of the book for law-school students would be considerably enhanced if the text were reduced at least one-half in bulk. This could be accomplished by largely reducing the number of cases comprising the principal text, and relegating at least one-half of them to foot-notes.

In selecting the cases the author has been careful to use the case as finally decided and reported by the court of last resort. Upon the question as to whether a possible crime of attempt was committed when one decoyed an extortioner, the author cites *People* v. *Gardner,* 144 N. Y. 119, where the Court of Appeals overruled the Superior Court at general term, whose opinion to the effect that no crime was committed will be found where the case is reported in 73 Hun 66. Many text-books cite this case as decided at the general term, where the conviction was set aside and the accused discharged, to support the proposition that there is no guilt of attempt where one tries to do that which would not be a crime even if he succeeded (because of the absence of an essential element), though he really intended to do that which was a crime.

The table of cases is made much more convenient for quick reference by having the cases arranged alphabetically under the names of the defendants only.

The cases are wisely apportioned between England and the United States in the proportion of about one to three.

A valuable feature also is a citation showing such cases as are to be found in the case books of such well-known authors as Professor Beale of Harvard, Dr. Kenny of Cambridge, and Professor Lawson of the University of Missouri.

While the book is designed primarily for law students, it has many qualities which should commend it as a useful hand-book for the busy lawyer. The scheme embraces only the substantive law of crime, without including cases relating especially to procedure.

The work is most conscientiously and faithfully performed, and should be well received by legal scholars as well as lawyers actively engaged in the practice of their profession.

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COLUMBIA LAW REVIEW.

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THE FREQUENCY OF PERJURY.

A notable conviction has been obtained lately in New York County. A former Vice-President of a great insurance company has been found guilty of perjury and sentenced to serve six months in the penitentiary. He might have been condemned to ten years of imprisonment; but physicians testified that a long sentence would amount to one of death, moreover the jury recommended and the evidence made for mercy. It appeared that he gave the testimony which was the subject of the indictment not for self-serving motives, but in an attempt to shield others, and under advice to avoid inquiry as to a certain account. He had almost attained man's three score and ten years, and was in feeble health. For him conviction of crime was itself a dire punishment. His long life in the community had been esteemed blameless. His fellows considered him to have been a man of truth and honor; and as many of them as were called to the witness stand so testified. He was charged neither with wrongdoing toward the insured, nor breach of faith towards his former business associates; on the contrary it was keeping faith with the latter that made him "falsely true." It was not alleged, or shown, that he had expected to benefit personally, or to wrong any individual by his testimony, which was given under these conditions: When the accused was called before the Grand Jury as a witness in the general investigation of the insurance companies, the District Attorney, already apprised that a certain bank account in the Vice-President's name was actually a secret account of the Company, digged a pit; the witness fell into it and dismally failed to scramble out. He was not advised that his testimony might be used against him. The perjury alleged was predicated upon answers to questions apparently framed not so much to elicit information already in the inquisitor's possession as to test the witness, who, being technically

under affirmation but not under oath, at first said that the account was his own, but subsequently corrected his testimony and stated the actual fact, that in truth the money belonged to the Company, had been received by him under its president's direction, and had been a sore burden upon his mind. Thus before the completion of his testimony he had told the whole truth; but none the less he had spun for the present his own rope; for upon these conflicting statements made in his individual capacity after the expiration of his official relation with the Company, and not upon proof of anterior wrongdoing as its officer, he was indicted, tried, convicted, sentenced.

These facts present an interesting question as to the true boundaries of that charitable domain of law, the *locus pœnitentiæ*. To justify conviction the jury had to find that the answers upon which perjury was predicated were *willful* falsehoods, material to the issues under investigation and not expiated by the subsequent truthful statements; that the testimony, which in the event and at the same examination presented in its entirety the truth, was nevertheless perjurious in detail, and that the accused by turning away from the false answers and disclosing the truth had yet failed to save his soul alive. Obviously a witness who has made a false statement, whether in confusion, or deliberately, from self-serving motives or out of mistaken loyalty or generosity to others, will be slow to correct it if he realize that contradictions in his testimony will subject him to prosecution for perjury. How far this consideration should be weighed in enforcing the law of perjury, is a pretty subject for debate between father Chrysippus of the Stoics and the milder philosophers. The one thing certain is, that the law is not so enforced in general. And the thesis here is that even gross, palpable and persistent perjuries daily occurring are suffered to pass without chastisement by the ministers of the law.

Undeniably the man in the street has for this defendant a sympathy, in which the trial Judge, by his sentence, and the jury and District Attorney, by their recommendations to mercy, appear to have shared. The accused is generally considered to be a scapegoat; but this is not quite true. That useful, vicarious animal carried off into the wilderness the iniquities of the entire congregation; leaving them to start afresh upon the primrose path; but this unfortunate man bears only the burden of his own offence committed long after the official misdoings disclosed by the insurance investigation; and his conviction is in no sense a punishment of or

an atonement for any one of them. To the multitude who have clamored for punishment of the Company's officials it may, perhaps, seem to be in the nature of atonement that one of them has been convicted of any offence, even of one committed after the termination of his official life. But this error is obvious. No officer of the Company has been convicted of any criminal act in his official capacity; and the penalty here inflicted is rather analogous to that of a boy spanked for concealing an accomplished raid by his comrades upon a tempting orchard; his fellows escaping unwhipped and their plunder remaining undisgorged.

The case, while not complicated or difficult in itself, is nevertheless interesting in more ways than one. The jury were charged, of course, to acquit unless defendant were proved to be guilty "beyond a reasonable doubt." But after judgment the trial Judge granted a certificate that there were reasonable doubts as to (1) whether or no the substance of the controversy or matter in respect to which the perjurious testimony was material was stated in the indictment with sufficient certainty; (2) whether or no there was a fatal variance between the indictment and the proof, the indictment charging the taking by the defendant of his corporal oath before the Grand Jury and the proof establishing the taking of an affirmation only; two law points with which the jurors presumably in no way concerned themselves. Thus the case illustrates the anomalous but, perhaps, merciful procedure in New York, whereunder a jury, instructed by the Court, may fail to find any reasonable doubts, yet after their verdict of guilty the trial Judge who submitted the case to them may find for the Appellate Court's consideration, when the stigma of conviction has been branded upon the defendant, several doubts as to whether the case was properly submitted and decided. Whether a juster and more logical procedure might not be devised to prevent this moral and social disfigurement of the accused, by settling the formal law of the case before its submission to the jury, is not a question for discussion here, however important it may be in itself.

Psychologically the case is one for interesting speculation upon the sanction of an oath. Reason as we may, all of us are in greater or less degree under the spell of tradition and in the thrall of inherited ideas. To the logical mind, even though anthropomorphic in its theology, a lie being a lie, should be quite as offensive to Deity whether uttered as a false oath under formal requirements of the law, or as a false affirmation made in the belief that the

Almighty winks at untrue testimony so long as His attention is not particularly called to it by a special promise to tell the whole truth under penalty of His displeasure. It is a fair contention that oath-taking belittles God's majesty, attributes to Him man's weakness, and makes unverified falsehood a matter of small account; therein lies reason for the command to swear not at all, but to let communications be yea, yea, and nay, nay. Our forefathers, however, laid as little store by this divine injunction as by many others. They swore mightily by God's name and blood, by Saints, halidoms, and cross-hilted swords, even by their beards. We have inherited in varying degrees their awe of an oath and their toleration of unverified falsehood. A famously disreputable attorney of New York City in days gone by had a peculiar little fetich of his own. Never trustworthy under promise or stipulations, if he could be induced to pledge that curious asset, his "professional honor," he "leaned backward." Our modern procedure seeks to meet real, or merely avowed, conscientious objections to oath-taking by allowing affirmations under the mundane penalties of perjury,—pains and penalties so rarely inflicted as to have become the mere "rumble of a distant drum"; but although false affirmation is in law as perjurious as false swearing there are still witnesses who, if they can kiss their thumbs instead of "the book," will lie without hesitation; others who, unless sworn with covered heads, are prepared to tell any number of bald falsehoods, and yet others, even among the intelligent, to whom the ancient superstition, that God will punish a duly verified lie while overlooking a false affirmation, remains the strongest deterrent from false testimony. It is amusing to notice how many persons of light and leading still "knock wood" to avert an evil omen, as Dr. Johnson rubbed street posts, and interesting to speculate whether in a given case a witness has not felt more at liberty to adapt his testimony to the circumstances, if under affirmation only, than he would have felt if under oath.

What is of far more interest and importance to the public at large, and to the ministers of the law, than either the technicalities upon which are based the certified doubts as to the validity of this insurance officer's conviction, or metaphysical speculations upon the general obligation of an oath, is the fact that a Metropolitan jury against its sympathies, has found guilty of perjury a man of excellent repute because before the grand inquisition he made a misleading statement, confessed and retracted before the particular inquiry was over. For once the pains and penalties of perjury have been inflicted in a conspicuous instance. The sympathy expressed

for defendant is due in no small part to the fact, already adverted to, that every day men go unpunished for more flagrant perjuries than his. A Grand Jury in Columbia County, some time ago, refused to find an indictment for this offence upon evidence clear to mathematical demonstration, and when a Judge of the Supreme Court sent the case back to another Grand Inquest they, too, refused to find a bill; whether out of sympathy, or for less worthy reasons, one may only surmise. In Herkimer a Grand Jury thrice refused to indict a man upon uncontradicted evidence and despite specific instructions of a Justice of the Supreme Court, amounting to severe rebuke; the jurors in both cases violating their own oath of office.

Yet there is no dispute as to the gravity of the crime of false swearing. The District Attorney, in the insurance officer's case, asked and the trial Judge inflicted, a substantial sentence upon the ground, as expressed by the latter, that "This is a crime that strikes at the very root of justice." It would be highly improper, while this cause is still *sub judice,* to express here any opinion as to the merits of the appeal or the intrinsic justice of the judgment already rendered; but as a general statement the judicial utterance quoted is sound; and a crime that strikes at the root of justice should not be lightly passed over by the Courts, as perjury frequently is when not itself a direct issue in the case.

The Court of Special Sessions in the City of New York wherein, perhaps, more cases are heard and more false testimony given than in any other tribunal, except the Magistrate's Court, serves for illustration. Its justices sit both as Judges and jurors, triers of the fact and expounders of the law. The cases tried before them are misdemeanors and largely of the class of *mala prohibita,* violations of excise and speed laws, of statutes regulating the purity of food, the practice of regulated businesses, such as medicine and dentistry, and kindred ordinances; disobedience of which does not necessarily imply the moral obliquity that attaches to the *mala per se,* of which perjury is one. When upon an issue of fact those justices find guilty a defendant who upon the witness stand has wilfully denied the main fact in issue, they necessarily believe him beyond reasonable doubt to be guilty not only of breaking the Statute, without which the act might be innocent, but also of perjury, which is *malum per se* and a grave crime at Common Law. This Court is not one of record,[1] and therefore is not one of those to which the power of summary commitment for perjury has been

[1] *In Re* Deuel (1906) 116 App. Div., 512.

specifically given by the Penal Code,[2] but its justices, being Magistrates, may take cognizance of crimes committed before them, and, possessing the power to punish within defined limitations offences under their jurisdiction, they may properly consider in awarding punishment all the circumstances of the case; yet it is not rare to see a man, who, in order to escape judgment, has denied under oath the issuable facts, sentenced no more severely than the honester offender who pleads guilty, refusing to deny the facts and to hide behind false testimony. The truth seems to be that in daily practice both Bench and Bar have ceased to be shocked by ordinary false swearing. They may sometimes even laugh—as Jove did "at lovers' perjuries." Furthermore, the justices may reason that the false swearing may and should be punished in a separate action, where all technicalities of proof may be availed of, and there is, theoretically, force in that argument; yet it is quite safe to say that if persons tried in that Court understood that upon conviction they would receive an enhanced punishment for defending by a false oath, perjury would be sensibly diminished in at least one tribunal. Moreover, as against the argument that a defendant's false swearing should only be weighed in a separate trial for perjury, it is to be observed that in small cases, though involving gross perjuries, which are none the less sturdy blows at the root of justice, prosecutors are not swift to pursue the criminal. A case is recalled where a defendant was told from the Bench, and with truth: "You are guilty of perjury and should go to the penitentiary," and another, in which an attorney, endeavoring to maintain his client's defence to an action on a forfeited bail bond, took the stand and swore that the bondsman had not been in Court, at a time when the record in evidence showed the contrary. These instances occurred in different Counties, and in presence of the prosecutor, but neither of the false witnesses was proceeded against. They were not shining marks, and the technicalities of the rule against perjury operated to make the event of prosecution doubtful; as to the falsity of the testimony there was no doubt, but its materiality to the issue was not so clear. In a third County, where the prosecutor did act upon mathematically demonstrated evidence of perjury, the Grand Jury twice refused to indict, as already mentioned.

Legal periodicals from time to time advert to this crying evil of false testimony with brave words. The Bench declaims against

[2] Sec. 102.

it. In a case of disbarment just reported, the Appellate Division mentions the perjury of the accused attorney as capping the climax of his offences. A President of the State Bar Association in his annual address some years ago said very truly: "If the lawyers of this State would positively discourage false swearing on the part of their own clients and honestly endeavor to have it punished when committed by the clients or their adversary, the crime would grow suddenly less." Borne along by his enthusiasm he went further and said: "It is the professional duty of every lawyer to do this; he owes it to his fellow man; he owes it to his Country, and he owes it to his God." The words are of record; but whether the orator ever performed this solemn duty in a specific instance, or whether he has been so fortunate as never to be placed in circumstances requiring him to do so, history does not relate.

That a sentiment has long existed in favor of swift procedure against false witnesses was emphasized by Mr. Justice Gaynor of the New York Supreme Court in a trenchant paper, "How to Stop Perjury," appearing in *Bench and Bar* of January, 1907. Quoting Section 102 of the New York Penal Code which, embodying a statute antedating the last century, authorizes a Court of Record to commit summarily witnesses whose testimony before it appears probably to be false, or to take their recognizances with sureties to answer an indictment for perjury, the learned Judge says:

"The perjurer would no more dare to come forward in our Courts than in the English Court if he knew that our trial judges were in the habit of committing perjurers on the spot. Nor would any lawyer produce an obvious perjurer if he knew that to do so would mean his prompt disbarment."

By way of illustration the writer said that recent summary commitments of this sort in Kings County had had a surprising effect in causing the abandonment of so many causes on the day calendar that for weeks thereafter it became necessary to increase it in order to get a sufficient number of cases to keep the Court busy. The necessary conclusion from his argument is one that the essayist, instead of shrinking from by reason of his judicial position, states incisively:

"The chief responsibility for such perjury in the Courts is with the trial judges themselves. Do you ask why this is so? It is because they have the power to stop it and do not stop it."

And the explanation Mr. Justice Gaynor gives for the failure of *nisi prius* Courts to exercise the power he deems so salutary is this:

"The reason may be found in the proneness of appeal judges in recent years to meddle with and adversely criticise trial judges in matters submitted to the discretion of the latter for the orderly and safe administration of justice. A trial judge may feel reluctant to commit a perjurer during the trial of a case if on appeal some judge (and maybe, one who never tried a case) is to hem and haw over his conduct, and say maybe it influenced the jury—just as though it should not have its legitimate influence like everything else in this world—and so on."[3]

Commenting upon that paper the able editor of *Bench and Bar* in subjoined note says:

"It is almost incredible that although the salutary provision of law to which Mr. Justice Gaynor calls attention has been in existence for more than a century there is only one *recorded* instance of summary commitment for perjury, so far as the research of the industrious annotators of our Penal Code has brought to light. * * * The 'one recorded instance' referred to above was the case of *Lindsay v. People* (1875), 67 Barb. 548, which was a prosecution for murder."[4]

Certainly an experienced and able judge should be better able than a member of the Bar or a text-writer to divine the reasons why his fellows on the Bench abstain from exercising a discretion expressly given by Statute. Yet it may be suggested, with all deference to higher authority, that there is a more charitable explanation than apprehension of reversal for judicial failure summarily to commit false swearers in Courts of Record, or to punish them

[3] The learned Judge probably had in mind certain cases collected in an article by the present writer entitled "Misconduct of the Bench as Reversible Error," in *Bench and Bar*, April, 1906, in which it was said: "So it was held to be reversible error for the Court to say, in an action for damages for indecent assault: 'If the Grand Jury was in session I should order this case before it,' and to recommend the District Attorney, who was present as a witness, to take cognizance of it. Davison *v.* Herring (1897) 24 App. Div. 402. Yet while it may be such error for the Court to express an opinion as to the credibility of a witness in a close case, especially if it be a criminal action, as, for example, to bid a defendant on trial for perjury to stop 'quibbling' and answer the question, People *v.* Hill (1899) 37 App. Div. 327, it is not necessarily error for the Court on trial and in the jury's presence to commit to jail a witness of one of the parties because of the character of his testimony given in the case. People *v.* Hayes (1894) 140 N. Y. 484. But the evidence of perjury should be convincing to justify this drastic action; and it has been held ground of reversal in a close case for the Court to say that a witness who testified that he saw a train approach without signal has either told the truth or committed perjury, thus eliminating the question of his mistake. Smith *v.* Lehigh Valley R. R. Co. (1902) 170 N. Y. 394."

[4] The case of People *v.* Hayes (1894) 140 N. Y. 484, cited in the footnote, *supra*, discloses another, which the learned editor adverts to later in his note.

in lesser tribunals, namely, the doubt whether the falsity and materiality of the suspected testimony is susceptible of proof, and the fear that such commitment of a witness, save in a manifestly clear case, might work injustice to an innocent party by prejudicing his possibly just cause with a jury. Like all summary powers this one of commitment is susceptible of abuse. Freely exercised by an unjudicial judge it would work evil. But when the Court sits both as judge and trier of facts the fear of improperly biasing the jury is not a factor in the decision; and when its verdict of guilty necessarily finds the defendant to be a perjurer, his punishment may justly be enhanced for that reason.

But it is not only in the court-room that false swearing flourishes. The offices of careless or corrupt attorneys raise a fine crop of the weed. The theory of the New York Code of Civil Procedure, and of other codes based upon it, seems to have been, and to be, that if an oath or affirmation be required to every formal pleading or statement, affiants will abstain from wilful falsehood, or, failing so to do, will suffer punishment. The result is very different from that apparently anticipated. Clients, especially corporate officers, verify pleadings with the vaguest ideas of their contents; and are constantly confronted in Court with their formal sworn statements contrary to their testimony upon the witness stand. This does not necessarily mean that in every instance the affiant knowingly, deliberately, and in order to deceive has made a false oath. It does mean, as a rule, that both he and his attorney consider an oath, and still more an affirmation, to be a formality as trifling as signing one's name. The Regents of the University of New York have erected the like paper bulwark about their examinations for the certificate required of students as preliminary qualification to the study of Law, Medicine, Dentistry, etc., by requiring oaths as to the identity of candidates, and other matters. The laws regulating the practice of those professions require licentiates to swear to certain facts upon registering. Perjuries under these requirements are constant. Until recently the Custom House authorities called upon a traveller returning from abroad to verify on the steamer a statement as to his dutiable effects. It is safe to say that over fifty per cent. of those declarations were untrue, and that their signers neither knew nor cared whether they were swearing to them. Deceit of the inspectors was a merry jest. Fortunately this fertile source of perjury has been done away with.

The manner in which the oath is administered in the great

majority of instances is not of a nature to impress the affiant. Many a notary is content to mumble: "Swear to this?" as he signs his name, not waiting for an affirmative answer, or making any inquiry as to the identity of the affiant. It is not strange then that instead of being a solemn and impressive act, as it was designed to be, the oath has come to be regarded as an idle formality, and is daily taken perfunctorily and with little thought of its truth. It has been said that in the Army a rule formerly existed—perhaps it still exists—holding officers liable for all missing equipment not certified to have been lost in storm or battle, and that a common result of this regulation was that lost or discarded articles were carried upon the lists until the occurrence of one of those two events, when "the affidavit sergeant" was called upon to make oath connecting the loss with the justifying occasion. One dislikes to think this of the service with which we particularly associate truth; and prefers to believe that the report is one of imagination, or at all events, that the post of "affidavit sergeant" was a rare detail; but *si non è vero, è ben trovato;* the story illustrates Tristram's Creed, "the vow that binds too tightly breaks itself."

But this evil of reckless swearing, which the Codes have enhanced by increasing the number of affidavits, is not a new one. The American Bar Association, in its laudable effort to maintain high professional standards, has sent out lately to its members a copy of Judge Sharswood's admirable Essay on Professional Ethics, originally published in 1854, as a compend of his lectures on professional aims and duties delivered to his Law Class in the University of Pennsylvania. Here is this eminent jurist's idea of an attorney's obligation in framing an affidavit:

"The client will be often required, in the course of a cause, to make affidavits of various kinds. There is no part of his business with his client, in which a lawyer should be more cautious, or even punctilious, than this. He should be careful lest he incur the moral guilt of subornation of perjury, if not the legal offence. An attorney may have communications with his client in such a way, in instructing him as to what the law requires him to state under oath or affirmation, in order to accomplish any particular object in view, as to offer an almost irresistible temptation and persuasion to stretch the conscience of the affiant up to the required point. Instead of drawing affidavits, and permitting them to be sworn to as a matter of course, as it is to be feared is too often the case, counsel should on all occasions take care to treat an oath with great solemnity, as a transaction to be very scrupulously watched, because involving great moral peril as well as liability to public dis-

grace and infamy. It lies especially in the way of the profession to give a high tone to public sentiment upon this all-important subject, the sacredness of an oath. It is always the wisest and best course to have an interview with the client, and draw from him by questions, whether he knows the facts which you know he is required to state, so that you may judge whether, as a conscientious man, he ought to make such affidavit."

Very much laxer was the practice of the attorney who, having dictated on Saturday afternoon an affidavit for use on Monday morning, and being in haste to leave the city, directed the stenographer to indicate whereabouts on the page his transcription would end, and there made his signature and verification on the blank sheet.

Even as this is written the daily press of New York City announces the dismissal from its police force of an officer upon a charge of securing by perjury the conviction of a citizen indicted for burglary. Not only did this policeman, according to the allegations, falsely testify to seeing the citizen with his hand in a cash register, but, meeting a fellow officer on the way to the station, he compelled the latter to corroborate the story. This second policeman eventually confessed the perjury, and upon his testimony the principal perjurer was tried, but after some five hours' deliberation by the jury acquitted. The Police Commissioner, however, found in the evidence sufficient ground to dismiss the principal. But the accomplice he retained on the force and detailed to the Headquarters Squad in order that he might not be "pounded" for telling the truth, at the same time reading to all the available men of the station a lecture in which he said, as reported:[5]

"You men know as well as I do what the general reputation of a policeman's testimony is in the criminal Courts of this town. I am sorry to say I know, and you men know that it is rather against the force"; and again: "You and I know that it is the tradition of this force to hang together and to give testimony in one another's favor, no matter what the facts are. And I know as well as you know that lots of men on the force are pounded for going against that rule—and that is a shame to the force."

In all this there is, most unfortunately, nothing new—nor does the shame of it attach to one city alone. Not only in the halls, but in the purlieus of justice and by the mouths of its lesser ministers is this grievous offence committed habitually. If in the case of the

[5] In reply to inquiry at Police Headquarters this report was said to be correct.

insurance official the *locus pœnitentiæ* was practically non-existent, in the case of the peaching policeman it was wide as the horizon. Here were two officers of the law charged with a most hideous crime against justice in seeking deliberately to send a citizen to State's prison by their perjured testimony. The principal criminal is acquitted. His only punishment is dismissal from the force. His accomplice by confession escapes all punishment and receives a desirable detail in order that he may not be punished by his associates for revealing the truth and righting a wrong. If the evil is so widespread is it because the remedy is not commensurate? And if there is an adequate remedy why does this crime that saps the very root of justice go unwhipped more than almost any other?

In seven years, 1900 to 1906, inclusive, the District Attorney of New York County disposed of one hundred and seventy-three cases of perjury and obtained, including pleas of guilty, fifty convictions. There were four acquittals, thirty-eight dismissals by the Grand Jury, and eighty-one cases discharged. The leanest year was 1901, when eight cases were disposed of as follows: One conviction, three dismissals by the Grand Jury, and four discharges. The geatest was 1906, in which thirty-six cases were disposed of by twelve convictions, one acquittal, eighteen discharges and five dismissals.

During the same period the *Digest* shows nine appeals in criminal causes. It discloses also an instructive matter of discipline, *Re Lamb*,[6] wherein the respondent was disbarred for obtaining his client's verification to a complaint falsely alleging the plaintiff to be owner of certain stock, which pleading was supplemented by the attorney's affidavit that he knew the facts therein stated to be true. A plea that the offences alleged were committed in the United States Court and without the jurisdiction of the State Court was held to be unavailing; the Appellate Division saying: "There is no place within its (the Bar's) ranks for perjurers and suborners."

The crime is, technically, hard to establish by proof. At Common Law prior to the Statute, 23 Geo. II, Ch. 11, it was most difficult to frame a valid indictment for it. The statements upon which a charge of perjury is predicated must be not only false, but must be willfully and knowingly so; they must be material, and sworn to before a person, tribunal or body lawfully entitled to

[6] (1905) 105 App. Div. 462.

administer the oath[7] which must be positive in terms unless the prosecutor is prepared to prove affirmatively that the affiant knew to be false what he swore to be true upon information and belief, a most difficult task.[8]

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[7] In Case *v.* People (1879) 76 N. Y. 242, the plaintiff in error, President of an Insurance Company, was convicted of perjury in falsely swearing to its annual report. The judgment was affirmed at General Term; but the Court of Appeals, Folger, J., alone dissenting, reversed the judgment below for error in not directing an acquittal upon the testimony, which was in effect this: The notary before whom the affidavit purported to have been taken testified that it was sworn to before him and subscribed by him; but on cross-examination he had no recollection of it (he was apparently the ordinary notary of commerce) and admitted that he only inferred the verification from his signature. The prisoner testified that he never took the oath; two other witnesses testified that although signed in the Company's office, the report was not sworn to, but was taken by the porter to the notary, who certified it in the President's absence. The porter testified that he took the affidavit to the notary, who subscribed it and attached his seal. How valuable from the standpoint of such officials is the statute requiring sworn annual reports! How fine the sense of duty in the accommodating notary of whom the Court said, however: "While the motive of the notary, in thus sanctioning a loose, irregular and illegal mode of doing business of this kind may be considered, it is easy to see that it may be accounted for, without ascribing to him any criminal intention." In Lambert *v.* People, *infra*, one ground of reversal was error in refusing to allow the accused to show that the notary before whom he swore was a resident of New Jersey and therefore ineligible to hold his office in New York.

[8] Lambert *v.* People (1879), 76 N. Y. 220, reversed the General Term's judgment affirming the conviction of plaintiff in error, also President of an Insurance Company, upon a charge of perjury in verifying the Company's annual statement. The affidavit made by the President and Secretary stated that affiants were officers of the Company on December 31st last, that "all the above described assets were the absolute property of the said Company, free and clear from any liens or claims thereon, except as above stated; and,"—following the semicolon,—"that the foregoing statement, with the schedules * * * are a full and correct exhibit of all the liabilities * * * according to the best of their information, knowledge and belief respectively." The indictment charged this statement of assets as an absolute oath and only traversed its truth. The accused contended that the affidavit was on information and belief. The People urged that the qualification of information and belief only related to averments following the semicolon, all preceding it being absolute. It was conceded that if the entire affidavit was on information and belief the indictment should have traversed not only the falsity of the averments but of the affiant's belief. In the Court of Appeals three judges wrote opinions for reversal. On the construction of the affidavit Rapallo and Hand, JJ., agreed that it was positive in its averment as to assets, a fact, however, that "does not in the least degree prevent acquittal of the prisoner, if the jury find that he did not intend, in fact, to swear positively, but only upon information and belief as to these matters." Andrews, J., concurred with Miller, J., who, reading the main opinion, said that it would be going very far to hold that a person could be convicted of so flagrant a crime as perjury which, depending upon intent and knowledge, must be willful, corrupt and malicious, "upon the mere insertion of a single dot in a sentence, and solely upon a question of precise, accurate and grammatical punctuation." He further said: "To uphold the conviction here we must assume that the accused understood perfectly the effect of the affidavit; that he examined it critically, and considered the force of the commas and semicolons made therein; before he took the oath."

The falsity of the oath must be proved either by two witnesses or by one witness and strongly corroborating circumstances, although these circumstances need not be of sufficient probative value in themselves to establish the offence apart from the witnesses' testimony. At the Common Law it was not enough to show that the accused had sworn to diametrically opposite statements.[9] The prosecution had to show which statement was false. It has been sought in New York State to correct this defect by so amending the Penal Code as to provide that in any prosecution for perjury the falsity of the testimony set forth in the indictment shall be presumptively established by proof of defendant's contrary testimony under oath in "any *other* written testimony, declaration, deposition, certificate, affidavit, *or other writing by him subscribed.*"[10] Literally construed this would not apply to contradictory statements in the same action or proceeding, or to statements not in writing or not subscribed by the accused. The amendment has yet to go through the process of exposition by the Courts. But although the ancient technicality has been greatly reduced, the offence of perjury remains one of the most difficult to establish.

The sum of the matter is that both Bench and Bar have been over-lenient in respect to this crime. The remedies for it lie in cultivating a sterner sentiment in place of present apathy, and in the exercise by Courts of their summary powers—with due caution, but as the Statute contemplates—as well as in the slower and more technical criminal action. Attorneys encouraging and abetting in reckless affidavit-making should be disciplined by Bar Associations and the Courts. The efficacy of such a course is made apparent while the ink on this paper is still wet. In the prevailing "rent war" on the East Side of New York City, a Municipal Judge is said to have announced that he will hold attorneys, as well as the clients, responsible for perjured defences in dispossess proceedings. If such a course were consistently followed, the congestion of calendars would be greatly abated if not entirely relieved. Notaries should be held with us, as they are abroad, to a greater sense of responsibility. There can be no healthy civic life when the fountains of justice are poisoned by falsehood, where perjurers escape unwhipped, and perjury itself is a jest, as it is in the lesser Courts of a great City. Especially is this true when those who taint these fountains are the ministers charged to keep them pure. Zealous

[9] 1 Lewin C. C. 270.

[10] Ch. 324, Laws of 1906; Penal Code, Sec. 101a. The italics are ours.

but impractical reformers would have the police force not only protect our lives and property, and execute process, which is their true function, but also guard our morals. The foundation of good morals is truth-telling; and we have a consensus of opinion, illustrated by examples, that it is considered the correct thing for men on the police force of all cities to "hang together" even to the extent of perjury, a condition all the more saddening and deplorable when one considers the splendid courage and self-sacrifice constantly displayed by these same men in the line of duty, and realizes that, as New York City's Police Commissioner truly said: "The truthful men have to suffer in reputation for the liars." It would quickly become just as "honorable" for a policeman to tell the truth in every respect as it now is for him to lie in some regards, if public sentiment, and the action of Bench and Bar, were directed to that end.

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THE LAW OF SALES IN THE UNITED STATES.

I have been invited to furnish to the COLUMBIA LAW REVIEW some notes on the above subject from an English and particularly from a Scottish standpoint, and I gladly avail myself of the privilege.

First of all I must express my admiration of the methods recently adopted in the United States for the assimilation of the laws of the different States. The American Bar Association since its formation in 1878 has done noble work, and more recently the Standing Committee on Uniform State Laws has laboured incessantly and with the best results to give practical effect to theories of unification which at the outset seemed to many to be little better than a dream.

To institute a fair comparison between the efforts towards assimilation in the British Isles and the corresponding transatlantic movement it is necessary to call to mind the very different conditions applicable to each case. Each has its own difficulties, but they are different in kind. In Britain there is only one legislature and one supreme Appellate Court, while in the United States I understand that there are more than fifty legislatures and courts of last resort. On the other hand, the American legal traditions are those of English law and the variations therefrom made by the different legislatures and courts do not vary much in principle. It is vastly different as between England and Scotland. The sources of law have trickled down through many centuries in entirely different channels and in many respects the legal principles applicable to each country are still far removed from each other. The Sale of Goods Act of 1893 was in some respects a compromise; in other respects it formed a series of concessions on the part of Scotland which many Scottish lawyers deeply regret. Where the Scottish law is retained it is separately stated in the Act or left to the operation of the common law which was reserved to Scotland by the Act of Union of 1707.

In these circumstances the draft of the Sales Act prepared in 1902-3 by Professor Williston of Harvard at the request of the Commissioners on Uniform State Laws may be studied with interest and profit by the commercial lawyers of the United Kingdom. This draft was carefully considered and amended at successive annual meetings of the Commissioners and finally in 1906 was

recommended for adoption by the different legislatures of the United States. It is upon this draft that I now propose to make some notes. As a Scottish lawyer I have found it extremely suggestive in regard to the principles underlying certain variations between the laws of England and Scotland, and it is possible that having been trained in a legal atmosphere different alike from that of England and America I may be able to contribute something of value either in favour of, or adverse to, the variations which the draft contemplates upon the law of England as embodied in the British Statute.

The points of greatest interest to a Scottish lawyer are naturally those in which the law of Scotland prior to the British Act differed from the law of England and which by the Act have either been reserved to Scotland or yielded to England. Two of these are of outstanding importance, one of which was reserved to Scotland and the other yielded to England.

1. *The English law of warranty in sale.*

This warranty partakes of the nature of the *actio quanti minoris* of the civil law, and forms an exception to the prevailing rule that the law of Scotland follows the Civil Law while the law of England diverges from it. The difference may be expressed thus: In England some obligations of the seller are conditions, a breach of which permits the buyer to reject the goods and rescind the contract, while other obligations are called warranties, a breach of which does not authorise rejection or rescission. In Scotland on the other hand every material part of the contract of sale is a condition, a breach of which entitles the buyer to reject and rescind. The present writer has elsewhere endeavoured to trace the history of warranty in the English Law of Sale and has offered some suggestions as to its value and expediency.[1] The Sale of Goods Act reserves to the buyer in Scotland his former right of rejection and rescission and at the same time restricts the English buyer in accordance with the English common law. The Scottish buyer thus retains his right of rejection and also acquires a new privilege, which he may exercise at his option, of accepting the goods and claiming damages for a breach by the seller of any material part of the contract. The rules now applicable to England and Scotland respectively are set forth in section 11 of the British Act. Opinions may differ as to the propriety of the exceptional privi-

[1] See Juridical Review, vol. xv. pp. 50, 397; vol. xvi, p. 406.

lege given to the Scottish buyer, but it would be difficult to find a Scottish lawyer who would willingly tolerate the doubt and confusion arising from the English distinction between condition and warranty.

Professor Williston in commenting upon sect. 11 of the British Act objects to the use of the word "condition" as "including a promise or warranty." He thinks it unfortunate that "the distinction should become obliterated" for in his opinion "the legal ideas are distinct and should have distinct names." From a Scottish standpoint the distinction is of no practical value, and does not conduce to a clear expression of the law.

It is much more important to notice that the American Draft Act allows rescission as a remedy for breach of warranty.[2] The effect is to bring American law into line with Scottish law, as modified by the British Act. If the remedy of rescission is allowed as regards both condition and warranty, the distinction loses all practical importance. The buyer may continue to call it a warranty if he pleases, but if he exercises his option to rescind he thereby clothes the warranty with the attributes of a condition. The arguments of Professor Williston in favour of rescission[3] are interesting and suggestive, and the experience of Scotland during 14 years of codified statutory law confirms the view that the buyer's option operates no injustice to the seller.

On the footing of a right of election to the buyer the appropriate qualifications and provisions are admirably set forth in section 69 of the American Draft Act. This section is more complete and exhaustive than the corresponding section of the British Act.[4]

It may further be observed that, while in the case of rejection of the goods and rescission of the contract, the buyer in the British Act must notify "within a reasonable time" his intention to rescind, there is no provision in that Act for a similar notification where the buyer retains the goods but proposes to claim damages for defective quality. The absence of a provision of this kind has already caused trouble, particularly in Scotland where the remedy is new. Where a Scottish buyer avails himself of the option to retain defective goods and claim damages, the seller naturally expects, and is entitled to, reasonable notice of the intended claim in order that he may obtain and preserve rebutting evidence. Where notice is not given until after a considerable interval, the

[2] Sect. 69 (1). [3] 16 Harvard Law Review 465.
[4] Sect. 53.

Act affords no guide, and therefore recourse is usually had to the common-law practice of England in the case of a warranty. This, however, is not entirely satisfactory. The English rule as to warranty is embodied in the following words of Lord Loughborough: "No length of time elapsed after the sale will alter the nature of a contract originally false. Neither is notice necessary to be given, though the not giving notice will be a strong presumption against the buyer * * * and will make the proof on his part much more difficult."[5] In the American Draft the difficulty is overcome by requiring notice equally under a claim to reject the goods, and under a claim to keep them and claim damages. In the latter case the provision is in these terms: "If after acceptance of the goods the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not be liable therefor."[6]

If in the case of the seller's breach of warranty a right to rescind the whole contract is given to the buyer, equity dictates that a corresponding right of rescission should be given to the seller where the buyer is in default. This is not provided for in the British Act, but the right is expressly conferred by the American Draft. Section 51 deals with the buyer's liability for failing to accept delivery. It provides to the seller not merely the remedy of damages as in the British Act,[7] but, where the fault amounts to a repudiation or breach of the entire contract, it gives, by reference to the following sections, a right to rescind. Section 53 (1) (*d*) includes rescission among the remedies of an unpaid seller notwithstanding that the property in the goods may have passed to the buyer. Section 61 meets the case of an unpaid seller having a right of lien or having stopped the goods *in transitu,* but the exercise of the right to rescind is qualified by the condition that the seller shall have manifested his intention by notice to the buyer or by some other overt act. Section 65 gives a more general right to the seller to rescind where the goods have not been delivered to the buyer and the buyer has manifested his inability to perform his obligations or has committed a material breach of the contract. In this case also the rescission operates by notice to be given by the seller to the buyer. "As rescission is only an alternative remedy and is in derogation of the contract, a party who wishes to avail

[5] Fielder *v.* Starkin (1788) 1 H. Bl. 17, at p. 19.

[6] Sect. 49. [7] Sect. 37.

himself thereof must manifest his election in some way and must do so without undue delay. Election, once made, determines the plaintiff's rights."[8] It will be observed that the seller's right to rescind is not made to depend on the passing of the property but on the absence of delivery. In this respect it resembles the right of the seller in Scotland prior to the British Act.

The British Act, in lieu of a right to rescind, gives the seller rights of withholding delivery, and of lien and re-sale where the property has passed but the goods have not been delivered, and also rights of stoppage *in transitu* and re-sale where delivery has been given to a carrier.[9] None of these rights imply rescission of the contract,[10] except where the seller expressly reserves a right of re-sale in case of the buyer's default.[11]

2. *The English law of transfer of property by intention irrespective of delivery.*

This principle is embodied in section 18 of the American Draft Act and in section 17 of the British Act. Prior to 1893 it was unknown in Scotland, and Scottish opinion is not united as to the propriety of yielding to England in this matter. The result, so far as sale is concerned, is to abolish the maxim of the Roman law, "*traditionibus dominia rerum, non nudis pactis, transferuntur,*" which has all along formed part of the common law of Scotland. Transfer of property, irrespective of delivery, is specially inconvenient, in respect that, both in England and in Scotland, it is confined to sale and does not extend to security or donation. It is, however, so firmly fixed in the law of England that the adoption of the Scottish rule was not to be hoped for, and any variance in this matter between the laws of the two countries would have led to varying rules in almost every section of the Act.

While the principle of transfer by intention was, in the circumstances above mentioned, accepted in Scotland, the Scottish lawyer still feels a difficulty in recognising its merits. It is important to observe that in very early times the laws of England and Scotland in this matter were practically identical, and that subsequent divergences were due to alterations in the common law of England. In the days of Glanvill and Bracton in England, and of the *Regiam Majestatem* in Scotland, the Roman law, by which a transfer of property was not complete without delivery, was un-

[8] Professor Williston in 14 Harvard Law Review, 329, 330.
[9] Sect. 39. [10] Sect. 48 (1). [11] Sect. 48 (4).

questioned in either country. The exact period, manner and extent of the first change in the English law is involved in some obscurity. Sir Frederick Pollock cites a case in 1459, and explains it on the theory of "reciprocal grants."[12] Professor Ames puts the date about 1441,[13] while the present writer finds traces of it as early as 1347.[14] In any case, notwithstanding certain suggestions of a learned reporter,[15] there can be no doubt that the principle has governed English law for many centuries, and it is therefore not surprising that in the American Draft Act it is accepted without question.[16] As an abstract question, however, the balance of convenience seems largely in favour of making delivery, rather than intention, the test of the transfer of property in goods. Delivery is an overt act known and read of all men, while intention, so far as third persons are concerned, is an inference often misleading and always uncertain. In the words of an old-time judge, "the thoughts of men are not triable."[17] If the effects were confined to the parties themselves there could be little injustice, for the fault is their own if the intention is not made clear, but third persons, such as security holders and general creditors, have an interest and are often misled by apparent or reputed ownership.

Intention is often so nebulous that rules for ascertaining it are set forth in much the same terms in the American Draft [18] and the British Act.[19] There is, however, one important difference. In the rules referred to, the British Act treats the contract of sale or return as a conditional contract, and places it in the same category as a sale on approval, or on trial, or on satisfaction.[20] As the present writer has elsewhere pointed out,[21] the law both of England and Scotland treats all of these contracts as conditional contracts in the sense of section 1 (2),[22] that is to say, the condition affects the existence of the contract itself as a contract of sale, and is not merely a condition as opposed to warranty and dealt with in the part of the Act headed "Conditions and Warranties."[23] The latter kind of condition forms a term of a contract already in existence. In the former case, neither of the parties, or at most only one of the parties, is bound until the fulfillment of the condition; in the

[12] Contracts, 7th ed., p. 700, note.
[13] 8 Harvard Law Review, 259. [14] 15 Juridical Review 395.
[15] Sergeant Manning, 2 Man. & Ry. 566; 2 M. & G. 691; 1 C. B. 379.
[16] Sect. 18. [17] Brian, C. J., Y. B. 17 Edw. IV 1.
[18] Sect. 19. [19] Sect. 18. [20] Sect. 18 (4).
[21] 17 Juridical Review 223. [22] Sect. 1 (3) Amer. Draft.
[23] Sects. 10 to 15 Brit. Act; Sects. 11 to 16 Amer. Draft.

other case both parties are bound from the first, the condition merely appearing as an incident. The American Draft Act[24] distinguishes between a sale with a right to return, and a sale to take effect on approval or on trial or on satisfaction. Sale or return is treated as a term of an unconditional contract, while the others are treated as in themselves conditional contracts. The argument on which this distinction is based is stated by Professor Williston as follows: "A sale of goods with an option on the part of the buyer to return, *as the title and all beneficial interest are transferred,* necessarily throws the risk upon the buyer, for the impossibility of performing one-half of his alternative promise to return the goods or pay for them cannot excuse non-performance of the other half. On the other hand, when goods are delivered with an option to purchase, as *the buyer has never entered into an obligation to buy,* the risk necessarily remains with the seller. In England this distinction between a 'sale or return' and a 'sale on trial,' important as it is for the correct decision of many questions, has not been brought out by the decisions."[25] It is true that in "sale or return" a beneficial interest is transferred to the buyer, somewhat different from that transferred in the other cases. The buyer may transact with the subject of sale, and may sell at his option either at a higher or a lower price, provided that in the event of a sale of any kind he immediately becomes liable to the original seller for the amount of the valuation put by him upon the goods. It must further be conceded that in the Roman law the contract was treated as a *pactum displicentiæ,* which was resolutive of the contract rather than suspensive of it. On the other hand the points of resemblance seem to outweigh the differences, particularly the fact, common to both, that up to the point of fulfilment of the condition the buyer has not in any way bound himself to become a purchaser of the article. Up to that moment there is, strictly speaking, no contract of sale, and it seems anomalous to transfer property to a person as under a contract of sale, which contract in truth does not exist.

But, apart from the distinction just referred to, the American Draft fails to correct the error, which, in the view of the present writer, characterizes the British Act.[26] In both cases the passing of the property under the conditional sales referred to is presumed to be regulated by the intention of parties, whereas it is really

[24] Sect. 19, Rule 3 (1). [25] 9 Harvard Law Review 110.
[26] 17 Juridical Review 223.

regulated by the terms of the condition itself. The provisions in this respect are, therefore, misplaced in a section dealing only with intention.

Perhaps the leading advantage which the American Draft has over the Act passed for England, Scotland and Ireland, is the definition of "document of title." The formal definition contained in the section appropriated to definitions [27] scarcely differs from the British one imported by reference from the Factors Act of 1889; [28] but the British definition is vague, in respect that, while it appears to give negotiability to every document of title, it does not expressly say so, and, indeed, to hold negotiability as applicable to every one of the various documents expressly specified would not only infer a revolution in the law of England, Scotland and Ireland, but would be unworkable in practice. The consequence has been that the British courts have unduly narrowed the interpretation so as to exclude from negotiability documents which, at least in certain circumstances, are by mercantile practice entitled to the privilege. Another consequence has been that there is prevailing doubt and uncertainty as to the precise legal position of documents of title to goods. The American Draft shows that much consideration has been given to this question, and that all the difficulties have been fully brought under review. Special definitions are given in the body of the Draft, and these are accompanied by detailed rules for ascertaining when a document of title is negotiable and when it is not. Altogether fifteen separate sections which do not appear in the British Act are devoted to this subject.[29] These sections may be recommended to the careful consideration of all interested in the reform of the commercial laws of Great Britain and Ireland.

Naturally, in breaking new ground, the American Draft Act, in so far as it deals with negotiable instruments and documents of title, has not been received by the legislatures of the various States called upon to adopt it with the same unquestioning acceptance that has been accorded to its other provisions. Thus the State of New York has practically adopted the *ipsissima verba* of the draft except in sections 31 to 39, all of which deal with the negotiability of documents of title. The same object is aimed at in both cases, but further consideration seems to have convinced the legal specialists of New York that similar results may be obtained

[27] Sect. 76. [28] Sect. 1 (4). [29] Sects. 26-40.

by improved methods. It would unduly lengthen this paper, and would form a divergence from its main purpose, were we to offer any observations upon the quality of the divergences.

Only a passing reference can be made to minor differences between the American and British law of sales. Taking the American Draft Statute as a basis, the following notes may be of some service.

Section 4 increases the monetary limit under the Statute of Frauds from £10 to £100, or its American equivalent, five hundred dollars. This is a marked improvement. Scotland gets along very well without a Statute of Frauds, and, as Professor Williston observes, " a great deal of fraud is caused by the English statute." The higher limit of value is a compromise between the previous law of those States which have adopted or continued the Statute of Frauds and those which have abolished it altogether.

Section 6 deals with "undivided shares" of goods sold, and has no corresponding section in the British Act. The law as laid down probably does not represent the English law.

Section 7 covers a contingency not provided for in the British Act, viz., deterioration or *partial* destruction of goods sold. The corresponding section of the British Act [30] is followed so far as it deals with total destruction, and a subsection is added to meet the contingency referred to.

Section 9 defines "price," but it differs from the British Act in respect that price is not confined to a monetary consideration, but "may be made payable in any personal property." In other words "barter" comes within the Act. This is an advantage, and sets at rest a long and bitter controversy as to whether or not barter is a species of sale. Mr. Travis, in his work on Sales,[31] devotes a large, and perhaps disproportionate, number of pages to the discussion of the question whether barter and sale are practically the same, or whether they are radically different, but the distinction, though historically interesting, is in the present day more academical than practical.

Section 12 supplies a much needed definition of "express warranty."

The provisions of subsections (2), (3), and (4) of section 20, as to the rights of the holder of a bill of lading, are much more definite and intelligible than anything on the same subject to be found in the British Act, or in the Factors Act of 1889.

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[30] Sect. 6. [31] Boston, 1892.

Section 22 (*a*) creates an exception to the ordinary rule that property and risk are transferred to the buyer at the same time. Property "retained by the seller merely to secure performance by the buyer of his obligations under the contract" ceases from the time of delivery to be at the seller's risk.

The general effect of section 25 is much the same as section 25 (1) of the British Act, but it expresses more clearly the principle that, while delivery may not be necessary to pass property as between the parties, it is in many cases necessary in a question with third persons. The subsection secures the rights of special creditors of the seller with the same intention as, but more explicitly than, the British Act. As regards special creditors of the buyer protected by subsection (2) of section 25 of the British Act, it seems that the American law does not provide any such protection, and the subsection is therefore omitted. The general creditors of the seller are protected in case of bankruptcy by section 26, which provides a "reputed ownership" similar to that contained in section 44 of the English Bankruptcy Act of 1883. The present writer has elsewhere ventured to suggest that a similar reputed ownership should be provided for Scotland.[32]

Section 43, relating to the place, time and manner of delivery, differs from the corresponding section of the British Act [33] in two respects, (1) it adds usage of trade as a possible exception to the ordinary rule regarding the place of delivery, and (2) when the goods are in the possession of a third person mere notice to the third person of the fact of the sale is sufficient to operate delivery as against all others than the seller. In the case of the seller the British rule is adhered to, that the obligation to deliver is not fulfilled without an acknowledgment by the third person that he holds the goods on the buyer's behalf. The variation as to persons other than the seller is said to express the existing law of America, and it seems reasonable in view of the more definite negotiability given in that country to documents of title.

Section 44, as to the delivery of a wrong quantity, differs from the British Act [34] in creating a distinction according as the buyer knows, or does not know, that the seller is not going to fulfil the contract in full. If the buyer accepts partial delivery in the knowledge that the seller contemplates a breach of contract in respect of quantity, he must pay for the goods accepted at the contract rate,

[32] Commentaries on British Act 124. [33] Sect. 29.
[34] Sect. 30.

but if the buyer has used or disposed of the goods before the contemplated breach comes to his knowledge he is not liable for more than their fair value.

Section 53 (1) (*a*) is taken verbatim from section 39 (1) (*a*) of the British Act. It gives the unpaid seller "a lien on the goods *or a right to retain them* for the price while he is in possession of them." The words "or a right to retain them" are unnecessary and were not in the original English Bill. It will be remembered that the British Act was before the British Parliament as a Bill for five successive yearly sessions. It was introduced into the House of Lords by Lord Herschell in the Session of 1889, but so near to the close of the session that no progress was made. It was reintroduced in 1890 and passed the House of Lords as a purely English measure, but no attempt was made to proceed with it in the House of Commons. In the interval between the parliamentary sessions of 1890 and 1891 an attempt was made to adapt its provisions to Scotland and accordingly the Bill again appeared before the House of Lords in the Session of 1891 as a proposed measure applicable to the whole of the United Kingdom. Among the adaptations introduced for the purpose of applying the English Bill to Scotland there were references to the Scottish law of retention in the clauses now forming sections 39, 42, 43, 47 and 48 of the British Act, and the Interpretation Clause [35] expressly provided that "lien in Scotland includes right of retention." Now all this was a mistake. The fundamental alteration made in the law of Scotland, by which the property in goods sold passed to the buyer irrespective of delivery, did away with retention except to the extent of the seller's lien. Retention is the right of an undivested owner to retain his property notwithstanding a personal obligation to deliver it to another. The obligation remains personal, while the right of ownership, being real, continues with the seller and enables him as owner to dispose of the goods as he pleases. The adapters of the British Act were probably misled by the terms of the Factors Act of 1889, but that Act was passed on the footing that Scotland maintained its old rule as to the passing of the property. The American Draft very properly expunges the words "or right of retention" where it follows "lien" in other parts of the British Act, but the slightly different phraseology in the section now under notice has led to the superfluous and somewhat misleading words being retained.

[35] Sect. 62 (1).

Section 60, relating to the powers of resale given to the seller where the buyer is in default, differs considerably from the corresponding section of the British Act.[36] In this case, however, the American law does not extend the seller's powers but rather restricts them. The combined effect of the Sale of Goods Act of 1893 and the Factors Act of 1889 is to enable any seller in the United Kingdom having a lien to give a valid title whether the resale or other disposition of the goods is rightly made or not.[37] This is considered too drastic in America, where it is thought that "the requirements as to delivery and change of possession would generally protect the purchaser on the resale." It is, however, made clear in the American Draft and not left to inference as in the British Act, that upon a valid resale the seller is not liable to the original buyer for any profit made by the resale. In America notice is not required of an intention to resell, but except in the case of perishable goods the failure to give notice is relevant in any issue involving the question whether the buyer has been in default an unreasonable time. The British Act requires notice except in the case of perishable goods.[38]

Section 64, relating to damages for non-acceptance, introduces [39] a provision which is not law in the United Kingdom, but which is said to be part of the common law of the United States except in Illinois. It is to the effect that where the buyer repudiates the contract, or notifies the seller to proceed no farther therewith, the seller is bound to cease doing anything further towards carrying out the contract or the sale. The damages are to be fixed as at the date of the repudiation or countermand, and include not only labour or expense or material, but also loss of profit. This provision involves an important legal principle, discussed by Professor Williston in a Review article [40] published before he drafted the Bill. A good case is established for the section as against the alternative course permitted by British law to the party not in breach, and which is stated by Cockburn, C. J., in *Frost* v. *Knight*,[41] in these terms: "The promisee if he pleases may treat the notice of intention to repudiate as inoperative, and await the time when the contract is to be executed and then hold the other party responsible for all the consequences of non-performance. * * * On the

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[36] Sect. 49. [37] See Sale of Goods Act, sect. 48 (2).
[38] Sect. 48 (3). [39] Subsect. (4).
[40] 14 Harvard Law Review 317, 421.
[41] (1872) L. R. 7 Ex. 111.

other hand, the promisee may if he thinks proper treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." The American draft does not in every case permit of the alternative here mentioned, but, on the other hand, it does not require the seller to cease performance in every case of anticipatory breach by the buyer. As Professor Williston remarks: "There may be cases where the damage caused by stopping performance would be greater than that caused by finishing the necessary work." [42] The general principle, however, remains that where a distinct repudiation has taken place before complete performance, the plaintiff should not as a rule be bound or even entitled to continue performance where it would needlessly enhance damages.

In preferring the American law as laid down in section 64 of the Draft Act to the British law, it is not necessary to adopt the argument of Professor Williston contained in the Review article before referred to, to the effect that the British law, and also that of the majority of the American States, errs in principle in permitting an immediate action for an "anticipatory" breach of contract. We have not succeeded in following the reasoning, and are unable to view the seller's duty to mitigate damages as a sufficient reason for separating the contract of sale from any other contract.

Section 76 (1), containing definitions, distinguishes between the words "buyer" and "purchaser." Buyer is defined as in the British Act, and "means a person who buys or agrees to buy goods." This definition is governed by section 75 of the American Draft,[43] which enacts that the provisions of the Act do not apply, unless so stated, to mortgages, pledges or other securities. The word "purchaser" is not used in the British Act, and when used in the United Kingdom as a legal term it is treated as synonymous with "buyer." Before the Sale of Goods Act the words in common use in Great Britain were "purchaser" and "vendee" to the almost total exclusion of "buyer," while since the Act the word "purchaser" has been almost completely superseded by the word "buyer." Under the American definition, however, a new use is

[42] Notes to Draft Act, Sect. 64. [43] Sect. 61 (4) Brit. Act.

found for the now almost discarded term. It is made to include "mortgagee and pledgee" and has therefore a much wider meaning than "buyer." In the Draft Act the word "purchaser" is only used once,[44] but in the New York Act it is also used in sections 31, 33, 34 and 39, all of which relate to negotiable instruments, and differ as we have seen from the model sections of the Draft.

I have only one further remark to make, and this, like the immediately preceding one, arises out of a definition in section 76. "Valuable consideration" is defined as "any consideration sufficient to support a simple contract." No such definition is contained in the British Act, probably because the laws of England and Scotland on the subject are entirely different. Scotland does not divide contract into "simple contract" and "deed under seal," and, what is much more important, it knows nothing of the English doctrine of consideration. No contract in Scotland requires to be buttressed by a form which, though called "consideration" or "valuable consideration" is not necessarily adequate. The present writer has elsewhere discussed this subject in connection with the divergent laws of England and Scotland.[45] In the British Act the phrase "valuable consideration" occurs twice[46] and the word "consideration" on other two occasions.[47] In the first section of the Act "consideration" is not used in its technical sense; section 26 is expressly excluded from operation in Scotland; in section 47 the words "valuable consideration" would in Scotland be interpreted as "adequate consideration"; while in section 54, the phrase "failure of consideration" is introduced only negatively and need not be regarded in a country where consideration in this sense does not exist.

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[44] Sect. 20 (4).

[45] English Doctrine of Consideration in Contract, Glasgow 1891.

[46] Sects. 26 and 47. [47] Sects. 1 and 54.

THE DEVELOPMENT OF INTERNATIONAL LAW BY THE SECOND HAGUE CONFERENCE.

The second Hague Conference, which met from June 15 to October 18, 1907, differed in many respects from its predecessor of 1899. The first Conference is generally referred to as the "Peace Conference," but it is doubtful if the second will ever be so designated. In fact, not a few believe that instead of advancing, it has hindered the interests of peace by bringing new jealousies and rivalries to light and old ones into play; that instead of brotherly love, there was national hatred; instead of mutual accommodation, a tricky playing for position in the diplomatic race for power, and instead of an earnest desire for peace, a fixed determination not to be drawn into anything that would hinder the freedom either of preparation for, or action in, the grand clash of arms that is so generally anticipated.[1] This is doubtless due to the reaction that followed close upon the heels of the unwarranted hopefulness that preceded the assembling of the delegates. In striking contrast to its tone of eight years ago, the public evinced an attitude of almost universal optimism toward the Conference just closed.[2] Scarcely any project was too wild to find supporters who cherished hopes for its adoption.

The important question of the limitation of armaments found no place in the official programme[3] and that fact in itself may account, in part, for the changed tone with reference to the second Conference. The mere fact that disarmament had been included as one of the principal objects of the first Conference was sufficient to excite the scoffer and the skeptic; its exclusion from the second gave rise to the hope that men and nations had profited by experience and were willing to content themselves with more moderate aims than the peace of the world by mutual agreement. The first Conference had been able to accomplish nothing toward the disarmament of the nations beyond the expression of a "pious wish" that the subject might be taken up for consideration at some future

[1] See the current issues of the newspapers and magazines. The London Times, Weekly Ed., Oct. 25, 1907, is especially caustic.

[2] Holls, The Peace Conference at The Hague, Preface, p. vii; and The Independent, Oct. 31, 1907.

[3] Revue Générale de Droit International Public, T. xiii (1906), Documents, p. 12.

time; a similar wish is likewise the sum of accomplishment in this particular by the second Conference.[4]

The success of the first Conference has been found to lie in its more moderate efforts; the Court of Arbitration, though confessedly imperfect, has nevertheless performed its functions in a satisfactory manner on more than one occasion, and the Committee of Inquiry did good service at the time of the critical relations between England and Russia as a result of the North Sea incident. The adoption, moreover, in 1899 of a convention with respect to the Laws and Customs of War on Land, and another adapting the principles of the Geneva Convention of 1864 to maritime warfare, did much to mitigate the severities of war both on land and on sea. From the standpoint of the science of international law the conventions of the first Hague Conference marked the greatest single advance in its history through legislation. The majority of international law is customary law and it is only in very recent years that rules regulating the relations of nations have been adopted by express agreement. A large part of the law thus codified in 1899 had been previously practiced by the nations, but it was a distinct advance to have these practices codified, to have them formulated into concrete rules to which the nations gave their express consent. The setting of rules in this fashion is the only possible means of legislation in this sphere so long as international law rests on its present foundation of mutually independent states. Equality will not suffer legislation by a superior, so that legislation by agreement must remain the goal of international law. The work of the second Hague Conference marks an even further advance on the road toward international legislation by agreement. Many of the conventions of the first Conference have been revised and subjected to further elaboration and new ones have been adopted.

Before entering upon a detailed discussion of these conventions, it may be well to look briefly at some of the things the Conference did not do, for thus we shall be able to see why there is such universal disappointment with regard to the outcome. What was not done comprised so many important schemes that the failure to attain them has cast a shadow over the more modest but very solid results actually accomplished.

[4] Revue de Droit International et de Législation Comparée. Deuxième Série. T. ix, No. 6 (1er fascicule) (1907). Acte Final de la Deuxième Conférence Internationale de la Paix, p. 613. References to this publication will be made by the designation Revue.

The Court of Arbitration established by the first Hague Conference had two weaknesses. In the first place, the court was no court. That is, it was merely a number of distinguished jurists residing in various parts of the world who might be called upon to act as members of a board of arbitration. To be sure, when thus called upon, they were to meet in The Hague, to constitute themselves into a court and to make use of a procedure likewise provided by the convention. But the court was without real permanency of organization or location. Again, the use that was to be made of it was wholly optional in character; every feature of compulsion was lacking in its makeup; it had no jurisdiction except as states might agree to submit to its decisions.[5]

The United States and Great Britain sought to remedy these evils, the former by proposing the establishment of a permanent Court at the Hague with a local habitation and a name, a Court of Arbitral Justice; the latter by advocating the adoption of compulsory arbitration, at least in respect of conventional difficulties. The Conference contented itself, so far as the British proposal was concerned, with a declaration that the powers unanimously recognize the principle of obligatory arbitration, and that certain differences, especially those regarding the interpretation and application of conventional clauses, are susceptible of being submitted to obligatory arbitration. The declaration further set forth that, though it had been impossible to conclude a convention to this effect, the divergence of opinion had not passed the limits of a juridical controversy.[6] Germany was the leader of the successful opposition, which preferred to leave the matter for settlement by individual arrangements, largely because of the difficulty of agreeing upon the list of items to be arbitrated.[7]

The Court of Arbitral Justice, which the Hon. Joseph H. Choate, the head of the American delegation, advocated with so much zeal, was also interred among the "pious wishes,"[8] with the recommendation to the signatory powers of the adoption of a subjoined project for the establishment of a Court of Arbitral Justice and its institution as soon as an agreement upon the choice

[5] Text of The Hague Conventions, 1899. Convention for the Pacific Settlement of International Disputes, Title iv, On International Arbitration, Art. 15 ff.

[6] Revue, p. 613.

[7] The Fortnightly Review, Oct. 1907; The Second Hague Conference, by Sir Thomas Barclay.

[8] Revue, p. 613.

of judges and the constitution of the court could be reached. The project was opposed by the smaller states, notably by the South American states, which were desirous of equal representation on the court.[9] Such a representation the larger states were unwilling to give, both because it would render the court cumbersome in number and because of the character of the membership that was to be anticipated from certain of these states. The project that was subjoined contains a very detailed statement of the proposed court in its organization, jurisdiction, and procedure, so that it would be a simple matter to put it into effect if once an agreement could be reached upon the disputed points.[10]

The Conference gave expression to three other *vœux*,[11] as follows: 1. That in case of war, the competent authorities, both civil and military, shall make it their special duty to assure and protect the maintenance of the pacific relations and particularly the commercial and industrial relations between the populations of the belligerent states and neutral countries. 2. That the powers regulate by special conventions the position, as respects military charges, of the aliens established in their territories. 3. That the elaboration of a convention relative to the laws and customs of maritime war should find a place in the programme of the next Conference, and that, in any case, the powers should apply, as far as possible, to naval warfare the principles of the convention relative to the laws and customs of war on land.

Finally the calling of a third Conference was recommended which should be held after an interval similar to that which has elapsed since the preceding Conference, at a date to be fixed by mutual agreement among the powers. Attention was also called to the need of preparing the work of this third Conference sufficiently far ahead to permit of the deliberations proceeding with authority and despatch. To attain this object the Conference deemed it very desirable that about two years before the probable date of meeting, a committee of preparation should be charged to receive the propositions to be submitted to the Conference, to sift out the material susceptible of immediate international regulation and to prepare a programme which the Governments might receive in time to be studied seriously in each country. The

[9] London Times, Weekly Ed., Oct. 18, 1907. The Contemporary Review, Dec. 1907; Impressions from The Hague, by W. T. Stead.

[10] Revue, p. 615 ff. [11] Revue, p. 614.

Conference suggested that the committee should be further charged with proposing a method of organization and procedure for the Conference itself. In view of the great waste of time occasioned by the absence of a proper preparation and of the inappropriate character of some of the subjects included in the Russian programme, this recommendation must be considered very timely and one which will doubtless be followed with respect to future Conferences.

For the purpose of facilitating the transaction of business the Conference appointed four main committees which were in turn divided into smaller committees for the consideration of special topics. The reports of the committees were submitted to the Conference in its plenary sittings, of which there were eleven in all, and the proposals adopted in these sessions constitute the conventions agreed upon as follows:[12]

1. The peaceful regulation of international conflicts.
2. The limitation of the employment of force for the collection of contractual debts.
3. Relative to the commencement of hostilities.
4. Concerning the laws and customs of war on land.
5. Concerning the rights and duties of neutral powers and persons in case of war on land.
6. Relative to the treatment of merchant vessels of the enemy at the outbreak of war.
7. Relative to the transformation of merchantmen into warships.
8. Relative to the laying of automatic submarine mines of contact.
9. Concerning bombardment by naval forces in time of war.
10. For the adaptation to maritime war of the principles of the Geneva Convention.
11. Limitations on the right of capture in a maritime war.
12. Relative to the establishment of an International Prize Court.
13. Concerning the rights and duties ot neutral powers in a maritime war.
14. Declaration concerning the prohibition of hurling projectiles and explosives from balloons.

[12] Revue, p. 612. A summary of the work of the Conference may be found in Prof. Westlake's recent volume "War," being the second part of his International Law.

The first convention is a revision of the action of the Conference of 1899 in order "the better to assure the practical working of the Commission of Inquiry and the tribunals of arbitration, and to facilitate the recourse to arbitral justice when the subject of dispute is of a character to permit of a summary procedure." [13] No change was made in the articles relating to good offices and mediation, but those pertaining to the Commission of Inquiry have been increased from six to twenty-eight in number,[14] and at the suggestion of the United States the use of such a commission has been declared "desirable" as well as "useful." [15] The increase is due to the attempt to smooth the path of such commissions by settling in advance many questions of detail which might otherwise cause delay and annoyance, such as the place of meeting, which is to be The Hague when not otherwise stipulated, the language to be used, the time within which the parties shall set forth the facts, the method of forming the commission, the appointment of agents and counsel, the placing of the International Bureau of the Court of Arbitration at the service of commissions and a very elaborate procedure which is to be followed in the absence of a special stipulation to the contrary. The Commission of Inquiry is still limited to "the determination of the facts" and "has in no way the character of an arbitral award. It leaves the parties entire freedom as to the effect to be given to this determination." [16]

The revision of that part of the convention dealing with the Court of Arbitration was limited to a few matters of slight consequence; the two most important provide that in the model form of the Court "each party shall choose two arbiters, of whom only one may be a national or chosen from among those who have been designated by it as members of the permanent Court," [17] and that "in case of conflict between two powers, one of them may always address a note to the International Bureau containing a declaration that it is disposed to submit the difference to arbitration. The Bureau must, thereupon, immediately make known the declaration to the other party."

Numerous changes have been made in the procedure of the Court of Arbitration, all of which have the object in view of facilitating the "recourse to arbitral justice." An entirely new form of procedure was also introduced in certain cases under the

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[13] Revue, p. 622. [14] Revue, p. 624 ff. [15] Art. 9.
[16] Art. 35. [17] Art. 45.

title of "Summary Procedure in Arbitration"; its application is restricted to cases of a nature suited to a summary form of procedure, and under the reservation of the eventual use of the more formal procedure. The Court in such a case is to be composed of three judges; each of the parties chooses one and these two a third; if they cannot agree, then each presents two names and from these four one is drawn by lot. The third judge presides. Each party is represented before the Court by an agent. The procedure is exclusively in writing, though witnesses may be called.[18]

A summary procedure such as this may serve a very useful purpose in cases which do not justify an elaborate adjudication, or which are of such slight consequence as not to warrant the expense attached to the use of the regular form of procedure, or which may arise where a small state is one of the parties and may not be able to afford a large expenditure.

The second convention, that concerning the employment of force for the collection of contractual debts, is the one new subject of consequence that has come within the view of compulsory arbitration. The collection of public debts by armed force has found its most frequent application against some of the more irresponsible and revolutionary South American states. In 1902 Great Britain and Germany united to press their claims, among them being public contractual debts, by force against Venezuela.[19] A blockade, at first pacific, later warlike, was instituted by these powers against certain Venezuelan ports. This action called forth a note from the Secretary of Foreign Affairs for The Argentine Republic, Dr. Luis M. Drago, to the United States, in which the action of the blockading powers was characterized as a violation of the Monroe Doctrine and the United States were called upon to join hands with the South American states to prevent the collection by force of public debts. The doctrine therein propounded soon came to be known as the "Drago Doctrine," and, at the Pan-American Congress held at Rio de Janeiro in the summer of 1906, the Drago Doctrine formed a subject of animated discussion. There was a desire in the Congress to secure the endorsement of this principle as a part of international law. In view of the evident impropriety of debtor nations seeming to prescribe to their creditors the means by which their debts could be collected, the

[18] Arts. 86 to 90.

[19] American Journal of International Law, July 1907; State Loans in their Relation to International Policy, by Luis M. Drago. Documents in "Papers Relating to the Foreign Relations of the U. S." 1903.

Pan-American Congress merely passed a resolution recommending to their several governments the propriety of presenting the subject to the Hague Conference.[20]

The subject was presented to the Conference on behalf of the United States by Gen. Horace Porter, but in a modified form that came to be known as the "Porter Proposition." In this shape it met the approval of the Conference, though it was far from satisfactory to the South American states, and was acceded to by many of them only with reservations.[21]

The "Porter Proposition," as incorporated in the convention, provides that "the contracting powers are agreed not to have recourse to armed force for the recovery of contractual debts claimed by the Government of one country from the Government of another as being due its nationals. Nevertheless this agreement will not be valid when the debtor state refuses or leaves without reply an offer of arbitration, or, in case of acceptance, renders impossible the conclusion of a protocol (*compromis*), or, after the arbitration, fails to comply with the judgment rendered." [22] The arbitration, furthermore, shall proceed in accordance with the regular procedure of the Court of Arbitration, and the tribunal shall, unless the contrary be provided, determine the justice of the demand, the amount of the debt, the time and the mode of payment.[23] Instead of prohibiting the employment of force under all circumstances for the collection of public debts, as the Drago Doctrine demanded, the use of force is merely postponed till arbitration has been tried. The absolute prohibition of the use of force would have given an opportunity to states with no conscience to violate their obligations with impunity, while the present convention would seem to afford abundant protection against the misuse of power by the large states.[24]

The third convention, relating to the commencement of hostilities provides:

> 1. That the contracting powers agree that hostilities shall not be commenced without a preliminary and non-equivocal notice, which shall have either the form of a

[20] American Political Science Review, Feb. 1907, p. 187; The Third International Conference of American States, by Paul S. Reinsch.

[21] London Times, Weekly Ed., Oct. 18, 1907. The North American Review, Dec. 1907; The Work of The Second Peace Conference, by M. W. Hazeltine.

[22] Art. 1. [23] Art. 2.

[24] Review of Reviews, Dec. 1907; The Net Result at The Hague, by Dr. David Jayne Hill.

declaration of war, stating the grounds (*motivé*), or of an ultimatum with a conditional declaration of war.[25]

2. That a state of war shall be notified without delay to the neutral powers, and shall only produce an effect in regard to them after the receipt of a notification which may be given even by telegraph. It is moreover agreed that neutral powers may not set up absence of notification if it be shown that, undoubtedly and in fact, they were aware of the state of war.[26]

The impetus to this convention was doubtless the way in which the Russo-Japanese war began. It will be remembered that two days after the rupture of diplomatic relations, the Japanese suddenly began the war by an attack upon the Russian vessels in the harbor of Chemulpo. The Russians protested vigorously against the action of Japan, which was characterized as "bad faith" and "treachery,"[27] but the Russian protest lost much of its force in face of the fact that most of the wars of modern times have been begun without previous notification, and that the Russians themselves have by no means been consistent in their own practice.[28] The action of the Japanese, however, aroused a great deal of discussion, out of which grew the demand for a provision similar to that adopted. It is extremely doubtful whether such a convention as this will furnish any protection against trickery and bad faith; there is no stipulation regarding the length of time that must elapse between the declaration of war and the opening of hostilities so that it is still possible for them to be simultaneous, particularly as the declaration may be made by telegraph.

The second article, providing for the notification of neutrals, will serve the useful purpose of removing the uncertainty so often attaching to the precise moment at which war began and also enable the neutral the better to perform its duties and maintain its rights.[29]

The fourth convention is a revision of the convention of the first Hague Conference concerning the laws and customs of war

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[25] Art. 1. [26] Art. 2.

[27] Hershey, International Law and Diplomacy of the Russo-Japanese War, p. 62 ff.

[28] Ernest Nys, La Guerre et la Déclaration de la Guerre, Quelques Notes. Revue de Droit International et de Législation Comparée. Deuxième Série. T. vii, p. 517 ff. M. H. Nagaoka, La Guerre Russo-Japonaise et le Droit International. Revue de Droit, etc., T. vi, p. 461 ff.

[29] The Fortnightly Review, Oct. 1907; The Second Hague Conference, by Sir Thomas Barclay.

on land, and was undertaken, as the preamble recites, from the desire to lessen the evils of war so far as military necessity will permit. Furthermore, it is declared to be the intention of the contracting parties, that, as it is impossible to elaborate stipulations for all circumstances, in those cases where no regulations have been adopted they shall consider themselves bound by the principles of international law as established by the usages among nations, by the laws of humanity and the exigencies of the public conscience.

Only one change is made in the convention proper as distinguished from the regulations themselves; this is an addition to the effect that the belligerent who violates the provisions of the regulations shall be held for an indemnity, and shall be responsible for all violations committed by persons forming a part of its armed forces.[30] With few exceptions the changes made in the regulations were merely verbal, and two of them alone deserve mention. The first is an additional limitation placed upon the means of injuring an enemy, and forbids a belligerent to declare the rights or actions of the citizens of the opposing belligerent to be extinguished, suspended or not recoverable at law.[31] The second deals with the things an occupying enemy may seize, and is interesting from its very general character and from the indication it gives of the possibilities of future means of transportation; the addition in question declares that all means, whether upon the land, the sea or in the air, for the transmission of news or the transportation of persons or things shall be liable to seizure even if they belong to private persons, but they must be restored and the indemnity regulated at the conclusion of peace.[32] In connection with the rights of an occupying force it may be noted that submarine cables are not liable to seizure or destruction except in case of absolute necessity and they must be restored and an indemnity determined upon the recurrence of peace.[33]

The fifth convention concerns the rights and duties of neutral powers and persons in case of war on land, and is partly new and partly old. The old material consists of those regulations, included by the first Conference among the laws and customs of war on land, which deal with the belligerents interned and the wounded cared for by the neutral,[34] and with the treatment of railroads;[35] the new material treats of the rights and duties of neutral powers and persons.[36]

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[30] Art. 3. [31] Art. 23 (1). [32] Art. 53. [33] Art. 54.
[34] Arts. 11 to 15. [35] Art. 19. [36] Arts. 1 to 10.

While the action of the conference with respect to the position of neutrals is extremely limited in scope, it may nevertheless be regarded as a step calculated to result in giving definiteness to all the rights and duties of neutrals within a very much shorter time than would otherwise have been possible. It may seem the veriest commonplace to announce in solemn form that "the territory of neutral powers is inviolable"; "that it is forbidden to belligerents to march troops or send convoys, whether of munitions or of provisions, through the territory of a neutral power,"[37] and "that corps of combatants may not be formed, nor bureaux of enrollment opened upon the territory of a neutral power for the profit of the belligerents."[38] These are things, to be sure, which it has long been agreed no neutral state can permit and not be guilty of a violation of its neutral duties, and no belligerent do without infringing upon the rights of neutrals. Jefferson, when Secretary of State, gave expression, in classic form, to the duty of a neutral when he said "that if the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right."[39] Since that time there has been a general recognition of the active nature of neutral duty and of the obligation resting upon a neutral to forbid the acts above mentioned, which are now included in the convention. Though the mere adoption of a convention containing nothing new would not have been without value, there were, further, certain new provisions included which undoubtedly had their origin in the recent war between Japan and Russia. Belligerents are forbidden to "install on the territory of a neutral power a radio-telegraphic station or any apparatus intended to serve as a means of communication with the belligerent forces on land or sea," or "to utilize an installation of this kind established by them before the war upon the territory of a neutral power with an exclusively military purpose, and which is not opened to the use of the public."[40] A neutral power, however, is not bound to forbid or to hinder the use by belligerents of the telephone or telegraph cables or wireless apparatus which belong either to the state or to companies or to individuals, but restrictions placed upon the use of these materials must apply equally to both.[41] The motive for these provisions lay in the action of Russia in establishing a wireless

[37] Art. 2. [38] Art. 4.

[39] Moore, International Law Digest, vii, p. 881.

[40] Art. 3. [41] Arts. 8 and 9.

station at Che-Foo, on Chinese territory, by means of which communication with Port Arthur was sought. Despite the protest of Japan, the station was allowed to stand for some weeks before the Chinese authorities finally destroyed it.[42]

Another and more important question relating to the use of wireless telegraphy likewise arose during this war. A vessel fitted out with a wireless apparatus was chartered by the New York and the London *Times,* and the correspondent felt himself to be in a more or less dangerous position when he was threatened with death as a spy by the Russians, and warned off neutral waters and even off the high seas by Japan.[43] The Russian threat was, of course, absurd and in direct violation of the first Hague convention defining spies.[44] The Japanese attitude, however, raises the interesting question as to how such vessels shall be treated. War correspondents have hitherto been permitted to accompany armies in the field and send out reports, since the reports are under the censorship of the commander, who can thus prevent news, which he deems might be disadvantageous, from reaching the enemy through this source. The position of correspondents was regulated by the first Hague Conference, which provided that, when captured, they should be treated as prisoners of war if provided with a permit from the military authority of the army which they accompany, and this regulation was retained in the convention of the second Conference.[45] It is well known that the Japanese exercised a very stringent control over war correspondents and kept most of them cooling their heels in Tokio. Under such conditions correspondents can be made innocuous, but the case is far different when you have a vessel on the high seas so equipped as to be in constant communication with neutral territory though a thousand miles away. The possibilities of injury to the belligerent fleet through the exposure of its condition or position by wireless from such a vessel, though done through the ordinary news channels, are so great that no belligerent would feel inclined to permit it.

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[42] Lawrence, War and Neutrality in the Far East (2nd ed.), pp. 218-220. Hershey, International Law and Diplomacy of the Russo-Japanese War, p. 122, note 15.

[43] Lawrence, War and Neutrality in the Far East, p. 83 ff. Hershey, International Law and Diplomacy of the Russo-Japanese War, p. 118, note 6.

[44] Regulations respecting the Laws and Customs of War on Land, arts. 29-31, in the convention of both the first and second Hague Conferences.

[45] Art. 13.

It would be unreasonable to find fault with the Conference for not adopting sufficient regulations to avoid all difficulties from this newest and most astounding means of communication. We ought to realize that here is a very important question; the conflicting rights and interests of belligerents and neutrals have touched at a new point and it is yet to be determined which shall prevail.

Article 7 of this same convention seems to settle definitely the theoretical question of the legality of contraband trading, since it provides that a neutral power is not bound to prevent the exportation or transit, for the benefit of one or the other of the belligerents, of arms, munitions, and, in general, of anything that can be useful for an army or fleet.

Neutral persons are the nationals of a state that does not take part in a war.[46] Such a person forfeits his neutrality if he commits hostile acts against a belligerent, especially if he voluntarily takes service in the ranks of the armed forces of one of the parties, but in such a case he shall not be treated more rigorously by the belligerent against whom he has forfeited his neutrality than a citizen of the other belligerent.[47]

The sixth convention requires but a brief notice. It regulates the treatment of merchant vessels of the enemy at the outbreak of war. Such vessels when found in the enemy's ports or which come into them without knowledge of the hostilities, are to be permitted to depart freely, either at once or after a sufficient delay,[48] and enemy vessels found upon the high seas, which have quitted port before the outbreak of war and so are in ignorance of it, may not be confiscated, though they, with the enemy goods they carry, may be seized and held till the end of the war without indemnity, or they may be requisitioned or even destroyed upon condition that they be paid for.[49] This convention does not refer to merchant vessels, the construction of which indicates that they are intended to be transformed into war vessels.[50]

The seventh convention also refers to merchant vessels, and lays down certain conditions that must be fulfilled in transforming merchantmen into war vessels, but here as elsewhere the really important question failed of solution. It is of small consequence to agree that a vessel so transformed shall be officered and controlled by commissioned officers of the state whose flag it flies, that it shall bear the distinctive exterior signs of ships of war of its country, that its discipline shall be military, that it shall obey the

[46] Art. 6. [47] Art. 17. [48] Art. 1. [49] Arts. 3 and 4. [50] Art. 5.

laws and customs of war and that a note of the transformation shall be made by the belligerent in the list of its fleet vessels.[51] The important point, as was plainly evident in the case of the Russian vessels of the Volunteer Navy, was whether this change could be made upon the high seas.[52] The *Petersburg* and the *Smolensk,* belonging to the Russian Volunteer Fleet in the Black Sea, passed through the Bosporus and the Dardanelles as merchantmen and within a few days captured a British vessel, the *Malacca,* and held up a German mail steamer, the *Prince Heinrich,* in the Red Sea. In the face of the vigorous protests of both Great Britain and Germany the career of these vessels as belligerent cruisers was soon terminated, but the question of the legitimacy of the transformation upon the high seas from merchantmen to cruisers was left unsettled and no agreement with respect to it could be reached at The Hague. Neither the sixth nor the seventh convention was signed by the American delegation because they were considered more oppressive to the rights of private property than the present customary law.[53]

It would be a mistake to say that the eighth convention regulates the placing of submarine mines, if thereby it was meant to imply that anything like a complete regulation was attempted. A few rules, narrow in scope, were agreed to, which provide that floating mines shall become harmless within an hour after those who have placed them have lost control over them,[54] that anchored mines shall become harmless when they break their moorings and that mines shall not be placed along the coasts and ports of an enemy for the sole purpose of intercepting commercial navigation;[55] when anchored mines are used, every precaution must be taken for the security of neutral commerce, and these mines, so far as possible, must become harmless after a limited time, and notice of their location, as soon as military necessity permits, must be sent to the Governments.[56] These, with one or two other provisions looking to the protection of neutral commerce, constitute the convention. Great Britain was so much dissatisfied because the Conference would not agree to regulate the "location" of mines, and restrict their use to within the three-mile limit, that Sir Ernest Satow read

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[51] Arts. 1 to 6.

[52] Lawrence, War and Neutrality in the Far East, p. 205 ff. Hershey, International Law and Diplomacy of the Russo-Japanese War, p. 138 ff.

[53] The Review of Reviews, Dec. 1907; The Net Result at The Hague, by Dr. David Jayne Hill.

[54] Art. 1. [55] Art. 2. [56] Art. 3.

a declaration on behalf of Great Britain, in the nature of a protest, in the course of which he stated that "as this convention constitutes only a partial and inadequate solution of the problem, it can not be regarded as a complete exposition of international law upon this subject. Accordingly it will not be permissible to presume the legitimacy of an action for the mere reason that this convention has not prohibited it."[57] There was a feeling in the Conference that Great Britain was upholding the principle of regulating the "location" of mines from the advantage it would bring her extensive commercial interests, while not preventing her powerful vessels from carrying on their destructive operations against the shore from beyond the three-mile limit. The naval and military representatives of the United States declared that this Government would never be willing to restrict in any way its freedom of action with respect to the defence of its coasts.[58]

The ninth convention is an attempt to realize the *vœu* expressed by the first Conference, concerning the bombardment, by naval forces, of ports, towns, and villages not defended. That Conference forbade the bombardment of undefended places in a war on land and the present Conference has done the same with respect to bombardment from the sea, and a place is not regarded as defended for the sole reason that its harbor has been mined.[59] Military works, however, and military and naval establishments, depots of arms or of war-material, manufactories and installations suitable for the use of the fleet or army of the enemy and the warships in the harbor are liable to be bombarded, but only in the case that the local authorities do not proceed to their destruction within the time fixed and in case it can not be done otherwise than by cannon.[60] Likewise such places may be bombarded, if, after express notification, the local authorities refuse to supply requisitions of food or supplies necessary for the immediate need of the naval force there present, provided they be in proportion to the resources of the place, and be demanded upon the authorization of the commander of the naval force; as far as possible they shall be paid for in cash; if not, then receipts must be given. No undefended place may be

[57] London Times, Weekly Ed., Oct. 4 and 11, 1907. The correspondent speaks of this convention as a "humiliating failure" to arrive at any reasonable regulations for diminishing the dangers to peaceful shipping. M. W. Hazeltine in the North American Review, Dec. 1907, thinks this convention is "stigmatized as the exhibition of a peculiarly nauseous type of hypocrisy" and "leaves untouched the liberty of indiscriminate devastation."

[58] The Navy, November 1907, p. 46. [59] Art. 1. [60] Art. 2.

bombarded for a refusal to pay contributions in money.[61] The same provisions as in other cases of bombardment were adopted for the protection of buildings devoted to art, science and philanthropy.[62]

The tenth convention is a revision of the convention of 1899 for the adaptation to maritime warfare of the principles of the Geneva Convention of 1864. Such a revision was necessary by reason of the revision of the Geneva Convention that was made in 1906. The present convention is appreciably more detailed than the one it superseded, and the elaboration looks chiefly to a better care of the sick and wounded who may be taken on board by hospital ships. Hospital ships, equipped in whole or in part by individuals or societies officially recognized by neutral countries, are to be respected and to be exempt from capture "on condition that they put themselves under the direction of one of the belligerents, with the previous consent of their own country and the authorization of the belligerent himself."[63] Under the convention of 1899 they were their own masters and operated independently of either belligerent, except for certain restrictions, considered necessary for the protection of the belligerents, which are still retained. Following the revised form of the Geneva Convention it is agreed that "the distinctive signs" of the vessels and of the personnel provided for in this convention "may not be employed, either in time of peace or of war, to protect or to mark vessels other than those here mentioned,[64] and the signatory powers agree to pass or to propose the measures necessary "to punish, as a usurpation of military standards" the misuse of these signs.

The tenth article of the convention of 1899 was excluded from all the ratifications, but reappears in the new convention.[65] It provides that the shipwrecked, wounded, or sick who are landed at a neutral port with the consent of the local authorities, must, failing a contrary arrangement between the neutral state and the belligerent, be guarded by the neutral state, so that they may not be again able to take part in the military operations. The expenses of entertainment and internment shall be borne by the state to which the shipwrecked, wounded, or sick belong.[66]

The eleventh convention places restrictions on the right of cap-

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[61] Art. 4. [62] Art. 5. [63] Art. 3. [64] Art. 6.

[65] Sir Thomas Barclay, Problems of International Practice and Diplomacy, p. 247.

[66] Art. 15.

ture in a maritime war in respect to postal correspondence, to certain vessels and to the crews of merchant vessels. The growing importance of the mails and the advisability of an exceptional practice with regard to mail steamers have been subjects of frequent discussion by text writers since the civil war; the actual practice of the nations, too, has evidenced a tendency toward exemptions which have here been recognized. The mail, whether of neutrals or of belligerents, whether its character is official or private, found on the sea upon a neutral or belligerent vessel, is inviolable. If the vessel is seized, the mail is to be forwarded by the captor with the least possible delay. This freedom from seizure does not extend, however, to the mail upon vessels attempting to run a blockade, when such mail is destined to the blockaded port,[67] nor are neutral mail steamers freed from the ordinary laws of maritime war, but the right of visit is to be exercised only in case of necessity and with all the skill and speed possible.[68]

Boats devoted exclusively to coast-wise fishing or to insignificant local navigation, together with their equipment, and vessels of religious, scientific, or philanthropic missions, are free from capture, but this immunity is of course lost if they participate in any manner in hostilities.[69]

Upon the capture of an enemy merchantman, the members of the crew, citizens of a neutral state, may not be made prisoners of war, nor the captain and officers, upon their giving a formal promise in writing not to serve upon an enemy vessel during the continuance of the war.[70] A similar treatment is to be accorded to the officers and the crew, even though citizens of the enemy, upon a formal written promise not to perform any service, while hostilities last, having any connection with military operations.[71]

The twelfth convention concerns the establishment of an International Prize Court. The validity of a capture must be established before a court, first of the captor,[72] and eventually of the International Prize Court, under certain conditions of appeal,[73] which may be made by the neutral power, the neutral private person, or even the private individual belonging to the belligerent power, if the decision concerns goods carried by a neutral ship, or by an enemy ship which has been captured in the territorial waters of a neutral, when the capture has not been made the subject of diplomatic complaint, or when the capture is alleged to have been made

[67] Art. 1. [68] Art. 2. [69] Arts. 3 and 4. [70] Art. 5. [71] Art. 6.
[72] Art. 2. [73] Art. 3.

in violation of a conventional arrangement between the belligerents or of a legal provision of the belligerent captor. If the law to be applied has been agreed upon between the parties to the suit, then the stipulations of that convention are to be followed by the Court. In default of such stipulations, the Court shall apply the rules of international law. If generally recognized rules do not exist, the Court is to decide in accordance with the general principles of justice and equity; if the recourse is founded upon the violation of a legal provision imposed by the belligerent captor, the Court shall apply that provision, except in the case where it considers that the consequences are contrary to justice and equity.[74]

The law to be applied by the Court constituted one of the chief stumbling blocks in the way of its establishment. The difficulty lies in the difference between the law of prizes as administered by the English and by the American courts on the one hand, and the continental courts on the other, and it can not be regarded as an altogether satisfactory solution to leave the Court to act in accordance with the rules of international law—if there be any—and failing these, the principles of justice and equity.[75]

The judges are to be appointed by the contracting parties [76] for a period of six years;[77] they are equal in rank and take precedence in accordance with the date of the receipt of the notification of their nomination;[78] they enjoy the privileges and immunities of diplomats when in the performance of their duties outside their own country;[79] the number of judges is fifteen and nine constitute a quorum;[80] the judges appointed by the seven great powers are always called upon to serve, while those of the smaller states rotate according to an appended schedule;[81] they receive as remuneration a fixed sum for each day the court is in session and may not receive any remuneration from their own state or from any other as a member of the court.[82]

The procedure is elaborated in 23 articles and consists of two distinct parts, the written instruction and the oral debate.[83] The instruction consists in the deposit and exchange of all expositions and documents; every document produced by one party must be communicated in a certified copy to the other. Then follows a public oral debate upon the facts and the law.[84]

No part of international law has been less clearly determined

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[74] Art. 7. [75] London Times, Weekly Ed., Oct. 4, 1907.
[76] Art. 10. [77] Art. 11. [78] Art. 12. [79] Art. 13. [80] Art. 14.
[81] Art. 15. [82] Art. 20. [83] Art. 34. [84] Art. 35.

than that dealing with the rights and duties of neutrals in case of a maritime war. It is much to be doubted whether all the regulations of the thirteenth convention will produce only good results. The delegates of the United States refused to sign it on the ground that it imposes upon neutrals obligations which it might be impossible for them to discharge.[85]

In addition to setting forth the reciprocal obligations of neutrals and belligerents about which there is no doubt, a start has been made toward a settlement of some of the most vexed questions of recent years, and it is interesting to observe that the "three rules" of the Treaty of Washington have found at least a partial recognition. A neutral may not allow its territory to be used as a base of naval operations,[86] nor may it, directly or indirectly, transfer to a belligerent vessels of war, munitions, or materials of war,[87] though it is not bound to prevent the exportation or transit of arms and munitions to the belligerents.[88] These constitute that class of obligations of a neutral state which Mr. Holland regards as involving *abstention.*[89] When we turn to that class of obligations which involves *prevention,* "imposing upon the neutral state duties of interference with the action of belligerents and of its own subjects,"[90] we pass from acts of a positive character and enter a field of debatable questions. "A neutral government is bound to use the means at its disposal to prevent, within its jurisdiction, the equipment or armament of any vessel which it has reasonable ground to believe is intended to cruise or to carry on hostile operations against a power with which it is at peace. It is also bound to use the same care to prevent the departure from its jurisdiction of any vessel intended to cruise or to carry on hostile operations, and which has been, within said jurisdiction, adapted wholly or in part for warlike use."[91]

Such a provision by no means settles all the difficulties involved in the responsibility of a neutral state with respect to the issuance from its territory of vessels of war which may be prepared by its citizens for belligerent use, but it at least brings uniformity of obli-

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[85] Review of Reviews, Dec. 1907; The Net Result at The Hague, by Dr. David Jayne Hill. The London Times, Weekly Ed., Oct. 25, 1907, speaks of the "Convention skilfully framed to convert neutral ports into strategical bases for the convenience of belligerents who do not possess such bases of their own."

[86] Art. 5. [87] Art. 6. [88] Art. 7.

[89] T. E. Holland, Neutral Duties in a Maritime War, p. 2.

[90] T. E. Holland, Neutral Duties in a Maritime War, p. 3.

[91] Art. 8.

gation that is highly desirable. It still remains to be determined just what means a neutral must use to prevent its territory being improperly used or exactly what constitutes an improper use, but it would seem improbable that in the face of such a provision any state could or would suffer an open violation of its neutrality.

The two "twenty-four-hour rules" have also found a place in the convention. The first, which fixes the time a belligerent war vessel may remain in a neutral harbor, is made applicable only "in default of special regulations to the contrary by the neutral power," and in consequence leaves it still possible for a nation to continue the practice of allowing belligerent war vessels to remain an indefinite length of time within its waters.[92] The second of these rules is unequivocal in declaring that "when the war vessels of the two belligerents find themselves at the same time in a neutral port or road (*rade*), at least twenty-four hours must elapse between the departure of the vessel of one belligerent and the departure of the vessel of the other." The order of departure is determined by the order of arrival "except in the case where the first to arrive is allowed to prolong the time of its stay for special reasons." The same rule applies as between a neutral merchantman, and a belligerent war vessel.[93] The belligerent war vessel, furthermore, may not make use of neutral ports and roads to make repairs which would increase its military force,[94] or to renew or augment its military supplies or armament, or to increase its crew,[95] or to revictual except to the extent normally required in time of peace, or to take on more fuel than enough to reach the nearest home port, except in those countries which permit enough to fill their ordinary bunkers, or to take on fuel more than once in three months in the ports of the same neutral.[96]

Prizes may be brought into neutral ports only in case of necessity, and they must depart as soon as the cause which has justified their entry has ceased.[97] Furthermore, if a belligerent war vessel does not depart after notification by the neutral, it becomes the duty of the neutral to render the vessel incapable of going to sea during the war and to retain the officers and crew.[98]

The character and extent of the provisions referred to are sufficient to make it evident that not the least valuable part of the work of the Second Hague Conference is to be found in this last con-

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[92] Art. 12. [93] Art. 16. [94] Art. 17. [95] Art. 18.
[96] Art. 30. [97] Art. 21. [98] Art. 24.

vention, and to justify to no small degree those who believe that the results of the Conference are quite sufficient to give it a *raison d'être.*

A declaration closes the final act of the Conference—henceforth "the contracting parties agree, for a period extending to the end of the Third Peace Conference, to prohibit the launching of projectiles and explosives from balloons or by other new methods of a similar nature."

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THE TORT OF CONSPIRACY.

Whether conspiracy is a substantive cause of tort action remains a fruitful source of controversy, and the literature of the subject has received some notable additions during recent months. Under the title of *James* v. *Evans*[1] the Circuit Court of Appeals for the Third Circuit has reversed *Evans* v. *Freeman & James*,[2] holding that "in an action on the case for conspiracy the gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff"; and that as the tort in this case was capable of commission either by both defendants jointly, or by either separately, the decision of the Circuit Court was erroneous. The opinion is written by District Judge Bradford, and, it is submitted, is distinctly inferior, both in its consideration of authorities, and in its discussion of principles to that of District Judge Hammond, who delivered the opinion at Circuit.[3] It is to be hoped that a decision upon this subject may soon be rendered by the United States Supreme Court.

Judge Bradford cites *Collins* v. *Cronin*[4] as one of his authorities for the doctrine stated above. But that case is clearly opposed to his doctrine, for Justice Paxson there said: "In the case in hand the conspiracy was everything. Without it the plaintiff had no cause of action, for the plain reason that the acts charged in the declaration were of such a nature that they could not be committed by one defendant alone."

The learned judge might have discovered, in more recent Pennsylvania reports, other cases which are opposed to what he terms "the ancient and well-established doctrine applicable to civil actions charging conspiracy." In *Purvis* v. *United Brotherhood*,[5] defendants demanded that plaintiff should employ only union workmen; and declared that they intended to drive plaintiff out of business unless he unionized his mill. They also notified customers of plaintiff not to deal with him, threatening strikes on such third persons' establishments if they continued to deal with him. The

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[1] (1906) 149 Fed. 136. [2] (1906) 140 Fed. 419.

[3] See 7 Columbia Law Review 236.

[4] (1887) 117 Pa. 35; 11 At. 869.

[5] (1906) 214 Pa. 348; 63 At. 585, following Erdman *v.* Mitchell (1903), 207 Pa. 79; 59 At. 327. See George Jonas Glass Co. *v.* Glass Bottle, etc. Assoc. (1907, N. J. Eq.) 66 At. 953.

combination of the defendants to accomplish such a purpose was held to be an unlawful conspiracy, although under existing legislation in Pennsylvania it is not a crime.

The distinction between cases in which conspiracy is the gist of the action and in which it is not is brought out very clearly in a recent volume of Massachusetts reports. In *Bilafsky* v. *Conveyancers' Title Ins. Co.*,[6] the Court said: "This is one of those cases where the allegations as to conspiracy are at most allegations that what is alleged to have been done was done jointly. In such cases the acts alleged to have been done by the conspirators are not actionable unless they would have been actionable had they been done by the defendants severally." In *Pickett* v. *Walsh*,[7] the conspiracy of the defendants was held to be the very essence of their wrongdoing. Said the Court:

"A single individual may well be left to take his chances in a struggle with another individual. But in a struggle with a number of persons combined together to fight one individual, the individual's chance is small, if it exists at all. It is plain that a strike by a combination of persons has a power of coercion which an individual does not have. The result of this greater power of coercion on the part of a combination of individuals is that what is lawful for an individual is not the test of what is lawful for a combination of individuals; or to state it in another way, there are things which it is lawful for an individual to do which it is not lawful for a combination of individuals to do. * * * For the general proposition, that what is lawful for an individual is not necessarily lawful for a combination of individuals see *Quinn* v. *Leathem*,[8] *Mogul Steamship Co.* v. *McGregor*,[9] *Gregory* v. *Brunswick*.[10] It is in effect concluded by *Plant* v. *Woods*."[11]

The view taken by Judge Hammond in *James* v. *Evans*[12] was approved and applied in *Allis-Chalmers Co.* v. *Iron Molders' Union No. 125*[13] by the Circuit Court for the Eastern District of Wisconsin. In this case the Court held that "the constant maintenance of pickets by strikers after repeated acts of violence, the use of abusive epithets, and the creation of an unfriendly atmosphere surrounding workmen by such pickets constitutes a conspiracy for

[6] (1906) 192 Mass. 504, 78 N. E. 534.
[7] (1906) 192 Mass. 572; 78 N. E. 753; 6 L. R. A. N. S. 1067.
[8] (1901) A. C. 495, 511.
[9] (1892) A. C. 25, 45, affirming 23 Q. B. D. 598, 616.
[10] (1843) 6 M. & G. 205; s. c. on appeal 3 C. B. 481.
[11] (1900) 176 Mass. 492, 57 N. E. 1011.
[12] (1906) 149 Fed. 136.
[13] (1906) 150 Fed. 155.

the purpose of willfully or maliciously injuring the business of an employer." It also declares a conspiracy to wrongfully injure another to be actionable at common law, if it be so carried out as to cause damage, irrespective of whether the person injured would have had a remedy if the act had been done by a single person. The important case of *Randall* v. *Lonstorf*[14] is cited as settling the rule for Wisconsin that an act lawful when done by one person may be actionable when done by two or more in combination, which was binding upon the federal court.[15]

In the latest edition of his treatise on Torts[16] Mr. Bigelow seems to accept the view that conspiracy is at times a substantive tort, although in former editions he has rejected it. He writes:

"Passing by the criminal side of the subject as not within the scope of the present inquiry, one cannot fail to notice that we are in the way of a new tort if we have not indeed already reached the point; a tort founded, contrary to former ideas, upon conspiracy as motive as well as intent. Recent cases indicate that the Courts will not allow the formula of legal right to stand in the way of an action for damages by conspiracy. That is to say, the Courts are becoming accustomed to the idea that it should not follow that, because in certain cases one person may of legal right do an act to the damage intentionally of another, several persons may combine, with a malicious purpose to inflict damage."[17]

The action of *Sweeney* v. *Coote*[18] was brought for an injunction to restrain the defendant from unlawfully and maliciously conspiring with other persons to injure the plaintiff in her business and for damages. The plaintiff, a Roman Catholic, was appointed to give manual instruction in a national school under Presbyterian management. The defendant called a meeting of parents of children attending the school, at which several present came to an arrangement to withdraw their children from the school because of plaintiff's employment. This injured plaintiff by reducing her salary, which depended upon a capitation grant. The trial judge, being of the opinion that the defendant had unlawfully conspired with others to harm the plaintiff, granted the injunction and

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[14] (1905) 126 Wis. 147. See 7 Columbia Law Review 239.

[15] White *v.* White (1907) 111 N. W. 1116, is another Wisconsin case of conspiracy.

[16] Bigelow on Torts (1907) 8th Ed., p. 24.

[17] The author cites in this connection Plant *v.* Woods (1900) 176 Mass. 492; Berry *v.* Donovan (1905) 188 Mass. 353; Quinn *v.* Leathem (1901) A. C. 495. In another similar connection he cites Klingel's Pharmacy *v.* Sharp & Dohme (1906) 104 Md. 218, 64 At. 1029.

[18] (1906) 1 Ir. R. 51; s. c. on appeal (1907) A. C. 221.

directed damages to be assessed. On appeal the Chancery Division (Walker, L. J., dissenting) held that the defendant did combine with other parents to withdraw their children, and that such withdrawal resulted in loss to the plaintiff; but that the combination was not unlawful, and that no unlawful means were used to attain it; and, therefore, the plaintiff had no cause of action. This decision was affirmed by the House of Lords.

Of this case the *Law Quarterly Review*[19] says: "It is a notable addition to the weight of authority and learned opinion against the doctrine, strenuously maintained in this country by Lord Halsbury, that conspiracy is a substantive cause of action." After a careful study of all of the opinions reported in this case the writer feels constrained to question the accuracy of the statement just quoted. Lord Chancellor Loreburn says: "It is an action for conspiracy and no other ground is relied upon." Lord Halsbury declares: "There is no evidence upon which I think any court ought to rely * * * for saying that in this case there is any proof of a combination in the sense in which it is necessary for there to be in order to form the ground for an action for conspiracy." Lord Robertson remarked: "I do not think that this House is required to discuss once more the delicate questions of the law of conspiracy, merely because this case is labelled as belonging to that chapter of the law, when there are no facts to justify the description." Not one of the seven Lords taking part in the decision intimates a doubt that conspiracy may be a substantive cause of action. Nor is such a doctrine denied by any of the Irish judges in the lower courts.

In the opinion of the *Law Quarterly Review*, "The short reason of policy against that doctrine is that it would allow a single powerful capitalist, who might of course be a corporation as well as a natural person, to do with impunity things which would be no less oppressive for being done under a single control. The net of the law would catch the dog-fish by twos and threes and let the great shark escape." That the doctrine would operate in this way is not admitted; but, if it must so operate, the argument of the writer just quoted should lead to the immediate repeal of all statutes punishing conspiracy as a crime.

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[19] Vol. 23, at p. 364.

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FEBRUARY, NINETEEN HUNDRED AND EIGHT.

NOTES.

COVENANTS FOR PARTY WALLS.—A recent decision, *Hoffman* v. *Dickson* (1907) 92 Pac. 272, settles the law of Washington in accordance with what is now the judicial tendency, *Southworth* v. *Perring* (1905) 71 Kan. 755, that both the benefits and burdens of covenants for party walls run with the land at law. The usual agreement provides that A shall build the wall and B shall have the right to use it upon payment of one-half the original cost: the agreement to bind the heirs and assigns of both parties. Normally the wall when built is owned by A and B in severalty, subject to cross easements. Sometimes, however, A is held to own the entire wall, half of which rests on B's land. *Brown* v. *Pentz* (N. Y. 1851) 1 Abb. App. Dec. 227; *National Life Ins. Co.* v. *Lee* (1899) 75 Minn. 157. Conceivably the parties might effect such a result, to which the law of fixtures would present no obstacle; *Brown* v. *McKee* (1874) 57 N. Y. 684, 2 N. Y. City Ct. Rep. 320; but this is hardly a fair interpretation of

their intention. *Richardson* v. *Tobey* (1877) 121 Mass. 457; *Maine* v. *Cumston* (1867) 98 Mass. 317. Assuming, however, that B's contract is thus one for the purchase of land, *Mickel* v. *York* (1898) 175 Ill. 62, the law of running covenants has evidently no application, and B's grantee is not liable on the covenant, since he has made no contract. *Comstock* v. *Hitt* (1865) 37 Ill. 542. Even on the hypothesis that B had assigned the contract with his land, A or his grantee could acquire only the right to a specific performance of the contract, by foreclosure of the assignee's equitable interest in the wall: a proceeding which would seem offensive to the Rule against Perpetuities. *London etc. Ry.* v. *Gomm* (1882) L. R. 20 Ch. Div. 562. If A and his successors get title only until payment is made, *Standish* v. *Lawrence* (1872) 111 Mass. 111; *First Nat'l Bank* v. *Security Bank* (1895) 61 Minn. 25, the intention of the parties is probably to vest an absolute fee in A, with a contract for its purchase upon user, although in the decisions no conveyance of the wall appears. If A acquires merely a defeasible fee, his interest would pass upon user, without the need of a conveyance; but the agreement would not operate as a contract at all. B's grantee might be held on the ground of an implied promise to pay for the use he has made of another's property; but the recovery would be based on the value of the use, not on the cost of the wall. Whether A has title to the wall or not, the land of B may be held liable in the hands of purchasers with notice, even when the agreement is only parol, on the ground of equitable charge, *Keating* v. *Korfhage* (1885) 88 Mo. 524; *Burr* v. *Lamaster* (1890) 30 Neb. 688, or, more accurately, lien, *Arnold* v. *Chamberlain* (1896) 14 Tex. Civ. App. 34, enforcible by A or his grantee, even in jurisdictions where covenants for party walls do not run at law; but the parties must so have intended. *Mott* v. *Oppenheimer* (1892) 135 N. Y. 312. The recovery is not upon the covenant, but includes a decree establishing the lien, and if necessary providing for a sale of the land, *Fresno Canal Co.* v. *Dunbar* (1889) 80 Cal. 530, a distinction sometimes overlooked. *Garmire* v. *Willy* (1893) 36 Neb. 340. The occasional intimation that party wall covenants are restrictive in character, *Sharp* v. *Cheatham* (1885) 88 Mo. 498, seems futile unless they touch and concern the land. *W. Va. Transp. Co.* v. *Ohio etc. Co.* (1883) 22 W. Va. 600; *Kettle River Ry. Co.* v. *Eastern Ry. Co.* (1889) 41 Minn. 461. As to this see *infra*.

The basic reason for allowing the benefit of covenants to run—that the covenant favorably affects the land of the covenantee, *Austerberry* v. *Oldham* (1885) L. R. 29 Ch. Div. 750, 776; *Rogers* v. *Hosegood* (1900) L. R. 2 Ch. 388, 395—is lacking in the case of covenants for party walls. The performance of the covenant would be of no direct advantage to the land of A; nor would it affect its nature or quality, or the mode of enjoying it; see *Congleton* v. *Pattison* (1808) 10 East 130; nor would it enhance its value, except upon the assumption that the covenant bound the assigns of both parties—the question at issue. There is no benefit incident to the land, as there might be in the case of a covenant to pay taxes, *Post* v. *Kearney* (1849) 2 N. Y. 394. The contract seems purely collateral. *Cole* v. *Hughes* (1873) 54 N. Y. 444; *Gibson* v. *Holden* (1885) 115 Ill. 199.

That the benefit of these covenants does not run is not, however, con-

clusive as to the burden, *Conduit* v. *Ross* (1885) 102 Ind. 166, save where the theory prevails that the only covenants which run with the land are those which create easements. *Lincoln* v. *Burrage* (1901) 177 Mass. 378. Yet under the English requirements of privity, which are not satisfied by the grant of an incorporeal hereditament, *Hayward* v. *Bldg. Society* (1881) 8 Q. B. Div. 403, the usual form of party wall agreement is clearly insufficient to allow the burden to run. In this country also, where such a grant does constitute privity, *Nye* v. *Hoyle* (1890) 120 N. Y. 195; 2 COLUMBIA LAW REVIEW 554, it is submitted that the burden should be held personal to the covenantor. The agreement has been considered to imply a grant to A of an easement of way to enter B's lot and erect the wall, *Conduit* v. *Ross, supra,* and of an easement of support of the wall by B's land. *Roche* v. *Ulman* (1882) 104 Ill. 11; *King* v. *Wight* (1892) 155 Mass. 444. But a covenant to pay a sum of money does not bear the slightest relation to either of these easements. See *Morse* v. *Aldrich* (1837) 19 Pick. 449. The easement to enter and erect the wall arises at the time of the agreement: payment or non-payment can have no effect upon its existence, mode of user, or value. Likewise the easement of support, once granted, cannot be divested or endangered by any act of B or his successors; nor does the covenant relate in any way to B's land. It has been suggested, however, that B also acquires an easement of support of the wall, for which the performance of his covenant operates as a recompense. *Roche* v. *Ulman, supra; King* v. *Wight, supra.* A covenant by the dominant as well as the servient tenant may bind his land, *Midland Ry. Co.* v. *Fisher* (1890) 125 Ind. 19; *Carr* v. *Lowry* (1856) 27 Pa. St. 257, although no interest of the covenantee in the covenantor's land is protected; but it must concern the easement or the land in which the easement is granted. *Wiggins Ferry Co.* v. *Ohio etc. Ry. Co.* (1879) 94 Ill. 83. The covenant by B has no reference to the land of A; *Gibson* v. *Holden, supra;* nor does it concern B's easement. At most it is a covenant to pay for an easement already acquired, or to be acquired. If the former, failure to perform it could not result in the destruction or impairment of the easement, as it might in the case of a covenant by a dominant owner to contribute to the cost of repairs to his easement, which has been held to run. *Wooliscroft* v. *Norton* (1862) 15 Wis. 198; *Maxon* v. *Lane* (1885) 102 Ind. 364. If the latter, the burden could not run, as there would be no interest with which it might run until payment or user. Moreover, such a construction should fall within the Rule against Perpetuities. Gray Perp. (2nd ed.) § 314. Upon every theory, except that of equitable lien, applicable in but few cases, a construction of these covenants as personal, as in New York, *Sebald* v. *Mulholland* (1898) 155 N. Y. 455, and impliedly in England, 1 COLUMBIA LAW REVIEW 257, is the sounder. 4 COLUMBIA LAW REVIEW 441.

RESTORATION OF *Status Quo* UPON RESCISSION OF INSURANCE CONTRACT.—Upon the rescission in equity of a performed or partly performed contract, the plaintiff must, first, show fraud or mistake; *Nace* v. *Boyer* (1858) 30 Pa. St. 99; second, be guilty of no laches; *Whitcomb* v. *Hardy* (1898) 73 Minn. 285; third, have made no election to affirm; *Betts* v. *Gunn* (1857) 31 Ala. 219; *Masson* v. *Bovet* (N. Y. 1845) 1 Den. 69; and fourth,

must stand ready to "do equity." It is upon this last consideration that the *status quo* rule rests. *Carlton* v. *Hulett* (1892) 49 Minn. 308. In cases of mistake or failure of consideration, if without fault of either party it is no longer possible to do equity to an innocent defendant by restoring him to his original position, the court may well refuse relief. *Okill* v. *Whittaker* (1847) 2 Phillips 338; *Anderson* v. *McDaniel* (Ky. 1893) 22 S. W. 647. But when actual fraud is proved, the defendant cannot well urge such impossibility to bar a rescission, *Hammond* v. *Pennock* (1874) 61 N. Y. 145, whether it be due to his own acts, *Mayer* v. *Fishburn* (1902) 65 Neb. 626, or to the plaintiff's, *Shafer* v. *Sleade* (Ind. 1844) 7 Blackf. 178, or to causes beyond their control. *Hale* v. *Kobbert* (1899) 109 Iowa 128. It is enough if the plaintiff rescinds promptly upon the discovery of the fraud, *Baker* v. *Lever* (1876) 67 N. Y. 304, restores all that he has received, *Neblett* v. *McFarland* (1875) 92 U. S. 101, and accounts for that which cannot be restored *in specie*. *Bryant's Ex'r* v. *Boothe* (1859) 30 Ala. 311, 315. Mere change of circumstances, preventing a complete restoration of the *status quo*, does not avail as a defense, *Paquin* v. *Milliken* (1901) 163 Mo. 79. Some courts have even decreed partial rescission, *Hopkins* v. *Snedaker* (1874) 71 Ill. 449, or have otherwise shaped the relief to meet the circumstances. *Thackrah* v. *Haas* (1886) 119 U. S. 449. A restoration to *status quo* is often defined as a return of all benefits received. This is inaccurate for all that need be restored is what was received as a performance of the contract and the subsequent losses and profits and consequent value of the contract resulting therefrom are immaterial. The courts seek to undo the whole transaction, 2 Pom. Eq. Jur. 910, by cancelling promises, and returning the property which was transferred, regardless of its present value, *Gatling* v. *Newell* (1857) 9 Ind. 572; e. g., stocks which had depreciated, *Blake* v. *Mowatt* (1856) 21 Beav. 603, 613, or a note whereof the maker had meanwhile become insolvent. *Whitcomb* v. *Denio* (1880) 52 Vt. 382. The defendant's protection lies in the doctrines of laches and of election (both presupposing knowledge by the plaintiff of the fraud), which prevent the plaintiff from taking the advantages of the contract and then asking for a rescission when it becomes disadvantageous. *Grymes* v. *Sanders* (1876) 93 U. S. 55. But if the plaintiff's suit is not open to either of these objections, there is nothing to prevent him from rescinding for the fraud and incidentally getting out of a bad bargain; *Maturin* v. *Tredinnick* (1864) 12 Weekly Rep. 740; see *Dawson* v. *Sparks* (1881) 1 Tex. Unrep. Cas. 735; and the defendant cannot then complain of a change in the value of the property, which makes him a loser through the contract not being performed. *Goodrich* v. *Lathrop* (1892) 94 Cal. 56. It is obvious that in every case, upon discovery of the fraud, the defrauded party will promptly elect to rescind if the transaction has proved to be a losing one; if by reason of collateral facts it has turned out favorably in spite of the fraud, he will affirm it and sue for the fraud at common law, or avoid litigation entirely. The defendant cannot complain if the plaintiff makes that election which is most profitable to himself. In almost all of the cases where it is said that a return of all benefits received, so as to put the defendant in *statu quo*, is a condition of rescission, some other consideration really controlled the decision; e. g., the

plaintiff failed to prove fraud, *McNett* v. *Cooper* (1882) 13 Fed. 586, or was guilty of laches, *Robinson* v. *Siple* (1895) 129 Mo. 208, or sought to avoid returning what he held, *Lee* v. *Vacuum Oil Co.* (1891) 126 N. Y. 579, or manifested an election to affirm, *Cobb* v. *Hatfield* (1871) 46 N. Y. 533, or had an adequate remedy at law. *Naugle* v. *Yerkes* (1898) 83 Ill. App. 310; s. c. (1900) 187 Ill. 358. Thus it would seem that in equity the *status quo* rule is rather an incident to, than a condition of, the relief, *Brown* v. *Norman* (1888) 65 Miss. 369, 377, is flexible to meet the equities of each case and concerns itself only with things actually received under the contract.

In a recent New York case, a divided court allowed a rescission of an insurance contract for fraud by the insured in its inception, by a cancellation of the policy, and a return of all the premiums or assessments paid with interest, without any deduction for the risk carried. *Moore* v. *Mutual etc. Ass'n* (1907) 106 N. Y. Supp. 255. The contract was performed on the part of the insured, by the payment of premiums, and performable as to the insurer, being on its part a promise to pay upon death. *Reed* v. *Provident Life Soc.* (N. Y. 1907) 82 N. E. 734. Before any loss has occurred the value of a policy consists in the prospect of the company performing its promise, and the insured simply enjoys an ability to enforce performance if there should be a loss. But the previous discussion shows that such value and corresponding benefit to the insured is not within the *status quo* rule, which is satisfied by a return of the policy. *Hedden* v. *Griffin* (1884) 136 Mass. 229; *Merino* v. *Ins. Co.* (1904) 21 Times L. R. 167; contra, under the civil law, *Angers* v. *Mutual Reserve Ass'n* (1904) 35 Can. Sup. Ct. 330, 337, opinion of Taschereau, C. J. Cases like the principal case must not be confused with recovery of premiums where the policy is absolutely void *ab initio, Fisher* v. *Ins. Co.* (1894) 160 Mass. 386; s. c. 162 id. 236, nor with so-called "rescission" for an anticipatory breach where some courts allow such a recovery as a measure of damages. *Mutual Reserve Ass'n* v. *Ferrenbach* (1906) 144 Fed. 342; *American Life Ins. Co.* v. *McAden* (1885) 109 Pa. St. 399; cf. *Toplitz* v. *Bauer* (1900) 161 N. Y. 325, 335.

Recovery of Money Received by Defendant from the Plaintiff's Debtor.—Where payment to the defendant by the plaintiff's debtor discharges the debtor's obligation to the plaintiff, the plaintiff may recover in quasi contract. *Webb* v. *Myers* (1892) 64 Hun. 11. Where the plaintiff's right is not so destroyed, it is no objection to recovery from the defendant that the plaintiff has a remedy against the debtor. *Johnson* v. *Collins* (1862) 14 Iowa 63. Unjust enrichment at the plaintiff's expense does not mean a necessary loss to the plaintiff if the remedy be denied him. The test is whether the defendant has received money which he is not equitably entitled to keep from the plaintiff. *Roberts* v. *Ely* (1889) 113 N. Y. 128. The unsatisfactory application of this rule in the decisions arises largely from the apparent reluctance of law courts to base their decisions squarely upon equitable grounds, and their endeavor to fortify their conclusions by the unnecessary and sometimes strained application of other principles. If the defendant has obtained the money fraudulently, recov-

ery is sometimes said to rest upon the plaintiff's "right to waive the tort." *Andrews* v. *Hawley* (1857) 26 L. J. Ex. 323. The tort, however, may be upon the third party only, as where an order is forged, and yet recovery is allowed in such cases. *Casey* v. *Pilkington* (N. Y. 1903) 83 App. Div. 91. From the standpoint of quasi contract such a case would seem identical with that of a stolen order. The tort to the plaintiff is merely an accidental circumstance. Recovery is allowed because the defendant has received money he is not equitably entitled to retain. *Hindmarch* v. *Hoffman* (1889) 127 Pa. St. 284. The waiver of the tort is the effect of the action, not the cause of action, as suggested in *Brown* v. *Brown, supra.* Still looser reasoning is found in a decision which holds that the plaintiff, by suing ratified the defendant's collection, thereby discharging the debtor's obligation and thus, deprived of his remedy against the debtor and put to expense, was entitled to recover. *Homire* v. *Rogers* (1888) 74 Ia. 395.

It is evident that the mere relationship of debtor and creditor between the third party and the plaintiff and between the defendant and the third party would not of itself be sufficient to permit a recovery. There must be some relation between the plaintiff and defendant arising from the facts of the case. It is sometimes expressed, inaccurately, in the rule that there must be privity, express or implied, between the plaintiff and defendant. It is probably this idea, aided by the tendency to find an analogy at law, that has led to the theory of the defendant's liability as agent. Keener, Quasi-Contracts, 167. While applicable only where the defendant has assumed to act as agent it is stretched beyond justification where the defendant has not intended to so act, *Lilly* v. *Hays* (1836) 5 Ad. & E. 548, even though he be considered as estopped by his fraud to deny that he acted as agent. *Brown* v. *Brown* (N. Y. 1886) 40 Hun. 418. The absurdity of implying this relationship has led some courts to deny relief where natural justice would seem to demand it. *Clarance* v. *Marshall* (1834) 2 Cr. & M. 495; *Vaughan* v. *Matthews* (1849) 13 Q. B. 187. Other cases require the express assent of the defendant to hold the money for the plaintiff. *Williams* v. *Everett* (1811) 14 East 582. This rule saves the defendant if he is a tortfeasor. Assent is implied from the taking of the money, *Farmer* v. *Russell* (1798) 1 B. & P. 296; *Hamlin* v. *Haight* (1873) 32 Wis. 237, the intention of the recipient being immaterial. *Siems* v. *Pierre Sav. Bank* (1895) 7 S. D. 338. An examination of the cases, with the equitable nature of the action, *Moses* v. *Macferlan* (1760) 2 Burr. 1005, in mind, leads, it is submitted, to the conclusion that where the defendant has received money from the debtor as a payment of the debtor's obligation to the plaintiff, the latter may recover upon the simple fundamental theory of natural justice. See *De Bernales* v. *Fuller* (1810) 14 East. 590, n; *Hall* v. *Marston* (1822) 17 Mass. 575; *Berry* v. *Mayhew* (N. Y. 1861) 1 Daly 54; *Chapman* v. *Forbes* (1890) 123 N. Y. 532; *Casey* v. *Pilkington, supra; Legard* v. *Gholson* (1852) 24 Miss. 691; *Allen* v. *Stenger* (1874) 74 Ill. 119. The intention by the debtor to pay the plaintiff's claim and the receipt of the money by the defendant constitute the necessary relation between the plaintiff and the defendant. And it would seem that this requirement was satisfied when the payment is on a claim

which in fact belongs to the plaintiff, *Boyett* v. *Potter* (1886) 80 Ala. 476; semble, *State* v. *St. Johnsbury* (1887) 59 Vt. 332, but many jurisdictions are contra which deny a recovery when the defendant claimed in his own right. *Patrick* v. *Metcalf* (1867) 37 N. Y. 332; *Nolan* v. *Manton* (1884) 46 N. J. L. 231. Such decisions are attributable largely to the mistaken idea that actual assent is necessary, *Sergeant* v. *Stryker* (N. J. 1838) 1 Harr. 464, or that the relationship of principal and agent is fundamental, Keener, Quasi-Contracts, 167, or that the payment must have discharged the debt. *Patrick* v. *Metcalf, supra.* It is certainly anomalous for courts to admit that recovery in such cases would be in every sense conformable to natural justice, *Butterworth* v. *Gould* (1869) 41 N. Y. 450; *Sergeant* v. *Stryker, supra,* and then deny a remedy based thereon.

In a recent case the defendant by means of a non-negotiable order, drawn but never delivered, by the plaintiff, wrongfully procured the transfer to her account of the plaintiff's deposit in a savings bank. A recovery was properly denied. *Earle* v. *Whiting* (Mass. 1907) 82 N. E. 32. As shown by the foregoing principles, the assumption of the court that the action would lie had the plaintiff drawn out the money, was correct, whether, according to the by-laws of the bank, see *Levy* v. *Franklin Sav. Bank* (1875) 117 Mass. 448, the payment would or would not have discharged the bank's obligation to the plaintiff. But the defendant received nothing but a bare credit, against which the bank had a perfect defense. *Commonwealth* v. *Scituate Sav. Bank* (1884) 137 Mass. 301. Though recovery may be had where the defendant has received a credit on account, *Houser* v. *McGuinas* (1891) 108 N. C. 631, it proceeds upon the ground that some debt against the defendant has to that extent been cancelled, so that he has received "money's worth." *Danworth* v. *Dewey* (1824) 3 N. H. 79. In the principal case, therefore, the plaintiff failed in an essential element in his cause of action.

Presumptions of Law as Evidence.—It is maintained by some writers, Thayer, Prel. Treat. Evid. 563, 575; 4 Wigmore, Evid. §§ 3529, 3536, and an increasing number of courts, *Vincent* v. *Mutual Life Ass'n* (1904) 77 Conn. 281, that the only effect of a legal presumption as a presumption of law is to throw on the party against whom it operates the burden of going forward with the evidence. Under this view three elements may be present: first, the presumption, as such, requiring a decision in the proponent's favor in the absence of "some evidence to the contrary;" second, the logical inference arising from the facts upon which the presumption is based; third, a rule of substantive law accompanying, but not part of, the stronger presumptions, demanding a certain kind of evidence or degree of proof. It being theoretically for the judge to determine when enough "evidence to the contrary" has been established to cause the presumption as such to disappear, Wigmore Evid., *supra,* an exact application of the theory would require a charge stating what facts and combinations of facts—with due regard to the degrees of belief in the minds of the jury—would satisfy the judge's mind of such evidence. This is of course impracticable since a concise charge is necessary, and the spirit of the theory is complied with by simply emphasizing the disappearance of the presumption as such in the presence of some evidence to the contrary. While this theory seems

analytically a sound one, the fact remains that under charges as commonly given a certain weight beyond that arising from the logical inference is imparted to the presumption of law. While the courts do not often separate the artificial from the rational force, *Clayton* v. *Wardell* (1850) 4 N. Y. 230; *Piers* v. *Piers* (1849) 13 Jurist. 569, 572; *Carpenter* v. *Calvert* (1876) 83 Ill. 62; *Waddingham* v. *Waddingham* (1886) 21 Mo. App. 609, the common charge that the presumption remains until rebutted, *In re Marlo's Estate* (1906) 103 N. Y. Supp. 161, 166, overcome, *People* v. *Sanders* (1896) 114 Cal. 216; *Cogdell* v. *R. R. Co.* (1903) 132 N. C. 852, or destroyed by evidence to the contrary, Thayer Prel. Treatise Evid. 575, seems to impart more or less artificial force to the presumption in the minds of the jury. Whether it reach them in the form of a conclusion of law closely bound up with the rational inference or through the medium of a more or less unconscious coloring of the facts, the jury find nothing illogical in balancing the presumption as a whole against other logical inferences. The presumption having in fact probative force with the jury under the common charges, it is in a broad sense evidence and it is not surprising therefore that a number of courts have boldly held legal presumptions to be evidence, *Coffin* v. *United States* (1895) 156 U. S. 432; *McNey* v. *State* (1899) 57 Neb. 471; *State* v. *Schelly* (1902) 166 Mo. 616, or at least repudiating the other theory have held that they were to be weighed by the jury along with the evidence. *In re Cowdry's Will* (1905) 77 Vt. 359; *Sturdevant's Appeal* (1899) 71 Conn. 392; *Kirby* v. *United States* (1899) 174 U. S. 47; semble, *Johnson* v. *Johnson* (1900) 187 Ill. 86; cf. *Dunlop* v. *United States* (1879) 165 U. S. 486; *State* v. *Kennedy* (1900) 154 Mo. 268. Thus in a recent case in Vermont it was held error not to charge that the legal presumption of undue influence was itself a piece of evidence to be overcome by counterproof. *In re Rogers' Will* (Vt. 1907) 67 Atl. Rep. 726.

Theoretically there would seem to be no difference in the results reached by the two theories: under the first, a higher degree of proof is required to overcome the rule of substantive law accompanying the presumption; in the second, more evidence to rebut the presumption. There might well be a practical advantage, however, in presenting the presumption to the jury as an inference, thus avoiding a more complicated rule as to degree of proof. Moreover it is evident that the second view gives the trial judge greater control because it allows him to vary the artificial weight of the presumption according to its proper relative importance in connection with the other proof factors. Certainly trial judges are allowed great freedom in conveying to the jury the relative importance of the presumption in the case at bar. He may destroy its effect by special reference to the nature of the evidence; *Fire Ins. etc. Co.* v. *Merchants etc. Co.* (1881) 54 Vt. 657; or leave it to the common sense of the jury by merely calling it a probative factor, *Sturdevant's Appeal, supra,* or give it the arbitrary force of turning the scales when the evidence is balanced, *Barber's Appeal* (1893) 63 Conn. 393, or is doubtful. *Hawkins* v. *Grimes* (Ky. 1852) 13 Monroe 257. The necessity for simplicity and conciseness, however, has lead to a series of conventional charges which are non-committal and consistent with either view. This is best illustrated in the leading jurisdiction

supporting the view that presumptions are evidence, by the case of *Coffin* v. *United States, supra,* where the charges as originally given were substantially the same as those later given on the new trial. The growth of certain presumptions (death from seven years' absence) and the declining strength of others (legitimacy in England) seem more explicable on the theory that courts have regarded legal presumptions as a matter of evidence peculiarly within their control than that they were consciously formulating rules of substantive law. In view of this development; of the admittedly equivocal discussion of legal presumptions in many cases; of the many precedents for instructions rather favoring this theory; and of the practicability of conveying an artificial strength to a logical inference to be formed by the jury—this theory, though less scientific, scarcely deserves the severe criticism that it has suffered.

POWER OF TRUSTEES TO LEASE FOR A TERM EXTENDING BEYOND THE TRUST ESTATE.—When real property is impressed with a trust for the life of a beneficiary, the power of the trustee to lease may be viewed from the standpoint of the cestui que trust, or from that of the remainderman in fee. Whether the trustee acted with prudence as to rents, tenants, length of term, etc., are questions that concern the cestui; only the length of term affects the remainderman. For if it extend beyond the trust estate, the remainderman will take, not the property, as intended, but only the income. *Gomez* v. *Gomez* (1894) 81 Hun 566. Cases directly concerned with this power in either aspect are not numerous and the courts have sometimes not been careful in examining authorities to distinguish between the two questions respectively presented. If the trustees have implied or express power to lease, but the will or deed is silent as to the term, the lease granted may be one certain to bind the ultimate owner, as where there is a permanent lease, *Hitch* v. *Davis* (1853) 3 Md. Ch. 262, or, as in a recent case, a ninety-nine year lease, *In re Hubbell Trust* (Ia. 1907) 113 N. W. 512, or for a term of years with covenants for renewal. *Newcomb* v. *Ketteltas* (N. Y. 1855) 19 Barb. 608; *Bergengren* v. *Aldrich* (1885) 139 Mass. 259. Or it may be that the lease granted is for a short term, and the remainderman's interest be threatened only by the premature death of the cestui. As upholding the right to benefit the cestui by leases which may operate on the remainderman, *Naylor* v. *Arnitt* (1830) 1 R. & M. 502, *Fitzpatrick* v. *Waring* (1882) 11 L. R. Ir. 35, contra, *In re Shaw's Trusts* (1871) L. R. 12 Eq. Cas. 124, are often cited. These English cases do not deal with the leasing power from the remainderman's standpoint, but seem merely to determine whether the trustee could lease at all. *Newcomb* v. *Ketteltas, supra,* is the same: the trust estate had not expired and the court was concerned with the immediate status of the lease. The earliest case in this country is *Hitch* v. *Davis, supra,* where the bill asking authority to lease was dismissed because those ultimately entitled would be injured. *Greason* v. *Keteltas* (1858) lends some weight to the opposite view; but the trust was in continuance and the court merely looked to the prudence and good faith of the trustees as affecting the beneficiaries. It is doubtful if these two cases support the proposition that the trustees have

authority to renew leases after the death of the life-tenant, pursuant to a convenant. Cf. *Gomez* v. *Gomez, supra.* Later New York cases have qualified these decisions so that it may now be said that the trustee without express authority has no power to lease real property for a period which is certain to extend beyond the term of the trust, so as to bind the remainderman. *Matter of New York City* (1903) 81 App. Div. 27; *Matter of Armory Board* (1899) 29 Misc. 174; *Wier* v. *Barker* (1905) 104 App. Div. 112; *Matter of McCaffrey* (N. Y. 1888) 50 Hun 371; accord, *Bergengren* v. *Aldrich, supra; Standard Paint Co.* v. *Prince Mfg. Co.* (1895) 153 Pa. 474. In these cases, the leases, by reason of their length or of the renewal covenants, were certain to extend beyond the trusts. But if the term is admittedly reasonable, e. g., five years, where the probability of life of the beneficiary is twenty-five years, and the trust does terminate before the lease, what the rights of the lessee, the cestui's estate, and the remainderman would be, has never been squarely presented, although the language of the above cases could be logically applied to such a case. Such a lease would be good if made or sanctioned by the court before execution, *Hutcheson* v. *Hodnett* (1902) 115 Ga. 990, subject to be defeated by the cestui's death; for as the trustee cannot lease for the longest possible term, neither is he required to be in constant expectation of the life-tenant's death. In *Hines* v. *McCombs* (Ga. 1907) 58 S. E. 1124, the lease was held to continue after the cestui's death. The trustee, however, had express power to encroach upon the corpus of the trust. If the lease shall be good for the trust term and void for the excess only, see *Griffen* v. *Ford* (N. Y. 1857) 1 Bosw. 123 and *Matter of New York, supra,* p. 35, it is unjust to the tenant for life, for a lease of so uncertain tenure will produce no adequate income. *Fitzpatrick* v. *Waring, supra,* p. 48, per Law, C. The latter case intimates that the lease ought to bind the remainderman. It is difficult to see why the law should benefit one party at the expense of another, *Hitch* v. *Davis, supra,* and whether a court of chancery has power to bind such interests by a decree is doubtful. See *Gomez* v. *Gomez, supra,* dissenting opinion by Van Brunt, P. J. The court may take the view that such a lease, being reasonable, is an equitable method of settling these conflicting interests. Possibly the intent of sec. 86 of the Real Property Law (N. Y. Laws 1896, Chap. 547) was to enable the trustee to make a lease for five years that should be protected if the trust ended before that time. See *Wier* v. *Barker, supra,* p. 17.

A better method, it is submitted, protecting all the parties and benefiting none at the expense of another, is to require the lessee to surrender the unexpired term, upon compensation from the cestui's estate. In *Weeks* v. *Weeks* (1887) 106 N. Y. 646, where a receiver executed a lease, the court awarded compensation to the lessee for the term extending beyond the close of the litigation. It must be admitted that the result of such a rule is to reduce somewhat the value of the leasehold estate and consequently the income of the cestui, especially if the compensation to the lessee for the surrender is uncertain because the cestui has no other property or income. Nevertheless it seems the best method of adjusting the conflicting interests involved.

EVIDENCE IN A FORMER ACTION OR PROCEEDING AS AN ADMISSION.—Upon the question whether evidence produced by a party in a prior action or proceeding can be used as an admission against him in a subsequent trial there are two large classes of cases. The first is composed of cases in which the party has himself made the statement either orally, *Benedict* v. *Nichols* (Conn. 1792) 1 Root 434; *Johnson* v. *Powers* (1868) 40 Vt. 611, or in writing, *Boardman* v. *Wood* (1831) 3 Vt. 570. The evidence may have been introduced in a former trial of the same cause, *McAndrews* v. *Santee* (N. Y. 1869) 57 Barb. 193; *Fisher* v. *Monroe* (1893) 2 Misc. 326, or in another suit, *Boardman* v. *Wood, supra,* or an extra judicial proceeding, *Rex* v. *Merceron* (1818) 2 *Stark.* 323; but see *Mulliken* v. *Greer* (1838) 5 Mo. 489. The authorities are in apparent conflict with regard to how much of the party's evidence must be read. Some hold that all must be read, *Benedict* v. *Nichols, supra,* and if incomplete cannot be read at all. *Misner* v. *Darling* (1880) 44 Mich. 438. In other cases it is held that a party is not entitled to have all that he said on a former trial introduced as part of his admission, *Frick* v. *Kabaker* (1902) 116 Ia. 494, but may himself produce evidence to qualify it. *Boardman* v. *Wood, supra;* and see *Johnson* v. *Powers, supra.* These decisions can be largely reconciled by applying the rule that all that is bound together as one statement must be introduced although the admission be thereby qualified, but that other distinct matters need not be introduced although they accompanied the admissible statement.

The second class of cases consists of those in which the statement has been made by another than the party against whom it is sought to be used as an admission. Where such a statement is expressly adopted by the party there is no difficulty, *Rex* v. *John* (1835) 7 C. & P. 324; *State* v. *Gilbert* (1863) 36 Vt. 145, but there has been much difference of opinion as to what conduct is sufficient to raise an implication of adoption. It is well settled that the mere obtaining and filing of an affidavit or deposition do not constitute an adoption. *Hallett* v. *O'Brien* (1840) 1 Ala. 585; *Hovey* v. *Hovey* (1812) 9 Mass. 216. *Rushworth* v. *Countess of Pembroke* (1668) Hardres 472, laid down the rule that a deposition taken in one action could not be used in a second action unless the parties were the same in both. This rule was abandoned, but the case was relied upon in drawing a distinction between affidavits and depositions as admissions, based upon the theory that a party knows beforehand the contents of an affidavit which he reads in evidence, but not of a deposition in equity or of oral testimony. *Brickell* v. *Hulse* (1837) 7 A. & E. 454, 456. This involved an erroneous conception of equity practice, inasmuch as depositions were open to inspection prior to the hearing, and the distinction was repudiated in the leading case of *Richards* v. *Morgan* (1863), 10 Jur. N. S. 559, for the view that "the making use of it [evidence] as true, with knowledge of the contents" to prove a particular fact is the test in every case. *Evans* v. *Merthyr Tydfil* (1899) 1 Ch. 241. In so far as it relates to that fact its user as true by a party knowing the contents constitutes an admission, and this seems a sound rule, especially since a party need not read all of an affidavit or deposition. *Knight* v. *Rothschild* (1899) 172 Mass. 546; *Bageard* v. *Traction Co.* (1899) 64 N. J. L. 316, 321. The deposition itself or the pleadings may serve to show the purpose

for which it was used and with regard to which it is competent as an admission. *Richards* v. *Morgan, supra,* 565. There would seem to be no difference in principle between evidence given *viva voce* or in writing. "Bearing in mind, that the true ground on which such evidence is admissible, is, that a party seeking to establish a fact by evidence * * * must be taken to assert the fact he so seeks to prove, it seems to me to follow, that oral evidence, so far as it shall appear to have been used to establish a specific fact, will be evidence against the party using it as an assertion of that fact * * *." *Richards* v. *Morgan,* supra, 565. Of course a party is not bound by all that his witness may say and it is difficult to determine which parts of the testimony the party relied upon as true. Because a party offering a witness generally represents him as worthy of belief, *Ins. Co.* v. *Hillmon* (1902) 188 U. S. 208, 215, it does not follow that he adopts the testimony beforehand in ignorance of its contents. Assent may be implied where the witness has been called for the purpose of proving a particular fact, *Richards* v. *Morgan, supra,* 564; *Bageard* v. *Traction Co., supra,* but not from mere silence where the purpose is not clear. Wigmore, Evid. § 1072 (3); but see *Wilkins* v. *Stidger* (1863) 22 Cal. 232. As an attorney's acts bind his client when done in the conduct of litigation, it would seem upon principle that evidence may be adopted in the argument or summing up, or on a motion for new trial, but it seems doubtful if the courts would go to this extent. See *Richards* v. *Morgan, supra,* 562. The argument would probably be that counsel was not asserting the truth of the evidence but was merely presenting it to be weighed by the jury.

In a recent case, *Sizer & Co.* v. *Melton & Sons* (Ga. 1907) 58 S. E. 1055, the evidence of an officer of the defendant corporation had been taken in another case by interrogatories. These interrogatories and answers were offered by the plaintiffs to show admissions of material facts, but were excluded on the grounds that the agents had no authority to make the admissions for the principal, see 3 Columbia Law Review 494, and hence the case did not come within the first class (*supra*), and that there was no express or implied adoption by the defendant, as the interrogatories were not introduced in evidence by the corporation, and hence the case did not come within the second class (*supra*). The court went on to say that even if it had appeared that they were introduced on the former trial, that alone would not have made them admissible, in the absence of proof as to the specific purpose for which they were introduced. This decision seems entirely sound.

Fundamental Privileges and Discrimination Under Article Four, Section Two, of the United States Constitution.—Article four, section two, of the United States Constitution provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." A similar provision is found in the Articles of Confederation (Art. 4) and the purpose of both provisions was to form a close bond of union and comity by the abolition of interstate alienage. Accordingly the courts have held that privileges and immunities are the fundamental rights "which belong of right to citizens of all free governments" and "which have at all times been enjoyed by citizens of the several states." *Corfield* v. *Virginia* (U. S. 1823) 4 Wash. 371; *Paul* v. *Virginia* (U. S.

1868) 8 Wall. 168, 180. It has been held that among others the right to pass into another state and engage in trade, *Ward* v. *Maryland* (1870) 12 Wall. 814, to hold property, *Farmers' etc.* v. *Chicago etc. Ry* (1886) 27 Fed. 146, to institute an action, *Davis* v. *Pierce* (1862) 7 Minn. 13; *Cole* v. *Cunningham* (1889) 133 U. S. 107, 114, and to be impartially taxed, *Ward* v. *Maryland, supra; Wiley* v. *Palmer* (1848) 14 Ala. 627; *Sprague* v. *Fletcher* (1896) 69 Vt. 69, are fundamental. A right to fall within this classification must attach because of citizenship. Thus the right of communal property under the marriage laws of Louisiana was not a privilege or immunity because it is attached not to the citizenship of the individual, but to the contract of marriage made or executed in the state. *Conner* v. *Elliott* (U. S. 1885) 18 How. 591. But all rights pertaining to citizenship are not fundamental. Thus political rights, since they do not "belong of right to citizens of all free governments" are regarded as special rather than fundamental privileges. *Minor* v. *Happersett* (U. S. 1874) 21 Wall. 162, 172. Similarly are classed rights in the common property in the state, *Corfield* v. *Virginia, supra; McCready* v. *Coryell* (1876) 94 U. S. 391, which, though attaching to citizenship, arise from special circumstances. Moreover, since political and common property rights attach only because of residence in the particular locality there would seem to be no injustice in discriminating concerning their enjoyment against non-residents. See *Chemung Canal Bank* v. *Lowery* (1876) 93 U. S. 72, and discussion *infra*. A wife's expectant right of dower has been placed in the same category, *Bennett* v. *Haines* (1881) 51 Wis. 251, although it is difficult to understand why dower should not be regarded with other property rights or privileges as fundamental. See *Farmers' Loan & Trust Co.* v. *Chicago Ry., supra*. The fourth article, while forbidding a state from discriminating between its own citizens and those of other states, does not guarantee to a visiting citizen all the rights which he may enjoy in his own state. *Lemmon* v. *People* (1860) 20 N. Y. 562. Furthermore if there is a just basis for the apparent discrimination, the constitutional prohibition will not apply. Thus where the law provided for the tolling of the statute of limitations in favor of resident creditors when the debtor was out of the state, there was no real discrimination against a non-resident, since the reason for the tolling of the statute did not apply in his case. *Bank* v. *Lowery, supra*. It seems also that a state may discriminate in the exercise of its police power. Cf. *Wiley* v. *Palmer supra*. Thus laws that liquor licenses should be granted only to residents, *Welch* v. *State* (1890) 126 Ind. 71, 78; *Mette* v. *McGucken* (1885) 18 Neb. 323, and laws allowing residents to practice medicine without submitting to an examination required of non-residents have been held valid. *State* v. *Green* (1887) 112 Ind. 462; *Harding* v. *People* (1887) 10 Colo. 387; *France* v. *State* (1897) 57 Oh. St. 1; *State* v. *Randolph* (1892) 23 Ore. 74. Finally it seems that the discrimination must materially affect a right of the non-resident. Thus a statute requiring non-residents to give security for costs is valid. *Hold* v. *Tennallytown etc. R. R. Co.* (1895) 81 Md. 219. See *Head* v. *Daniels* (1887) 38 Kan. 9. These cases might also be upheld on the ground that the discrimination was based on a real difference in the position of the non-resident.

In a recent case the widow of a citizen of Pennsylvania sued in Ohio

on a right of action given by Pennsylvania for the death of her husband alleged to have been killed in Pennsylvania by the negligence of the defendant. In accordance with an Ohio statute, which gave its courts jurisdiction in case of such actions only when the death was that of a citizen of Ohio, the State Supreme Court denied the plaintiff's right. The United States Supreme Court held that the statute was constitutional and did not deprive citizens of other states of the privilege accorded to citizens of Ohio. *Chambers* v. *Baltimore & Ohio R. R.* (1907) 28 Sup. Ct. 34. The opinion, affirming that the right to sue is a fundamental privilege, points out that since the denial of the right in this case did not depend upon the non-citizenship of the plaintiff there was no discrimination. According to the statute of Pennsylvania as interpreted by its court a right of action never vested in the deceased. *Fink* v. *Garman* (1861) 40 Pa. St. 95. It could not, therefore, be argued that the right of action was denied to the deceased when denied to its representative. It might be said, as was suggested in the dissenting opinion, that the statute discriminated against the deceased in denying to him the privilege of having his estate increased if he were killed by the negligent act of another. But such a privilege, novel and specially conferred, cannot be considered a fundamental right.

THE LAW GOVERNING THE LIABILITY OF A DRAWER OR INDORSER OF A NEGOTIABLE INSTRUMENT PAYABLE IN A FOREIGN JURISDICTION.—The contract of a drawer or indorser of a negotiable instrument, as distinguished from the contract of the acceptor or maker, being performable at the *locus contractus,* the liability of the drawer or indorser is generally measured by the law of the place where the instrument was drawn or indorsed. Story, Conf. of Laws, §§ 314, 315, and cases cited. A qualification is found in cases treating of conditions precedent to the liability of the drawer or indorser—formal acts associated with the place of payment—where the courts have recognized the requirements of business necessity. Logic would demand that questions of the necessity or sufficiency of any act upon which the liability under a contract is conditioned, should be determined by the law of the place where the contract was made and is to be performed; while practical expediency requires that acts such as demand, protest, and notice, which in their nature are performable where the instrument is payable, should be controlled by the law of that place. A distinction appears to be made between the necessity of the act and the sufficiency of the act. By the weight of authority, necessity of demand and protest as a condition of holding the drawer or indorser, is determined by the law of the place where the instrument was drawn or indorsed. *Thorp* v. *Craig* (1860) 10 Ia. 461; *Aymar* v. *Sheldon* (N. Y. 1834) 12 Wend. 439; *Gay* v. *Rainey* (1878) 89 Ill. 221. The necessity of suing the acceptor or maker in order to hold the drawer or indorser is similarly determined. *Levy* v. *Cohen* (1848) 4 Ga. 1; *Hunt* v. *Standardt* (1860) 15 Ind. 33. But the sufficiency of the demand and protest, including consideration of the time and manner, is determined by the law of the place where the instrument is payable, *Donnegan* v. *Wood* (1873) 49 Ala. 242; *Sylvester* v. *Crohan* (1893) 138 N. Y. 494. *Pierce* v. *Indseth* (1882) 106 U. S. 546, together with the maturity of the

instrument, involving the question of days of grace, *Cribbs* v. *Adams* (Mass. 1869) 13 Gray 597; *Bowen* v. *Newell* (1855) 13 N. Y. 290. No distinction is made, however, between the necessity and the sufficiency of notice, both being determined by the *lex loci contractus,* according to the greater authority, *Huse* v. *Hamblin* (1870) 29 Ia. 501; *Snow* v. *Perkins* (1851) 2 Mich. 238; *Cook* v. *Litchfield* (1853) 9 N. Y. 279, although the practical objection to this rule—that it compelled the holder to know the law of the place where each indorsement was made in order to be secure in his rights against the respective indorsers—has induced the English courts to make the reasonableness of the notice a possible subject of inquiry. *Hirchfeld* v. *Smith* (1866) L. R. 1 C. P. 340; *Horne* v. *Rouquette* (1878) L. R. 3 Q. B. Div. 514.

The current of authority indicated is opposed by a unique decision in New York where the court held that the contract of the drawer of a bill or check to pay upon non-acceptance or non-payment by the drawee, was performable where the drawee resides; *Hibernia Nat. Bank* v. *Lacombe* (1881) 84 N. Y. 367; it would follow that with respect to protest and notice the law of the place upon which the instrument was drawn would govern. *Union Nat. Bank* v. *Chapmon* (1902) 169 N. Y. 538. The court relied on *Everett* v. *Vendryes* (1859) 19 N. Y. 436 and *Lee* v. *Selleck* (1865) 33 N. Y. 615. The *Everitt* case held that the form of an indorsement of a bill of exchange drawn and indorsed in New Granada but payable in New York, and its sufficiency to transfer title to the indorsee for the purpose of bringing suit were to be determined by the law of New York. The court admitted that if the action had been against the indorser the law of New Granada would have governed. It seems that the liability of the drawer was unquestioned and that the issue related to the right of one of two parties to sue—a question pertaining to the remedy and determinable by the *lex fori. Foss* v. *Nulting* (Mass. 1860) 14 Gray 484; *Scudder* v. *Union Nat. Bank* (1875) 91 U. S. 406, 413. In the *Lee* case the question was whether the law of New York governed with respect to the necessity of suit against the maker as a condition of holding the indorser of a note indorsed in Illinois and sent through the mail to the indorsee in New York. The court assumed that the law of the place where the indorsement was made governed, but held that under the circumstances the indorsement was made in New York. *Hibernian Nat. Bank* v. *Lacombe, supra,* therefore, was without substantial support, and appears to be limited to its precise facts, as a recent decision settles the law of New York in accordance with the general rule. A foreign bill of exchange was indorsed by the drawer to bankers in New York who sent it to their agent in Vienna to collect. The agent failed to protest the bill or to give notice to the drawer on the refusal of the drawees to pay as required by the laws of New York. The court held that the drawers were discharged from liability though under the laws of Austria no protest was necessary. *Amsinck* v. *Rogers* (N. Y. 1907) 82 N. E. 134.

RECENT DECISIONS.

ALEXANDER B. SIEGEL, *Editor-in-Charge.*

ADMIRALTY—JURISDICTION—MARITIME CONTRACT—CHARTER PARTY.—The libelant as broker for the respondent, executed a charter party in his own name. As a result of the respondent's breach of the contract, the libelant was compelled to pay damages, which he sought to recover by subrogation to the rights of the other party. *Held,* since the libel was founded on the charter party, admiralty had jurisdiction. *Adler* v. *Galbraith, Bacon & Co.* (1907) 156 Fed. 259.

Until modified recently by statute, 3 and 4 Vict. c. 65; 9 and 10 Vict. c. 99, the English admiralty refused jurisdiction over contracts unless made, and to be executed, upon the sea, bottomry bonds and seamen's wages alone being excepted. Benedict, Admiralty, 3rd Ed. § 111; *Ins. Co.* v. *Dunham* (1870) 11 Wall. 1. This restricted construction resulting from the illiberal policy of the common law courts, *DeLovio* v. *Boit* (1815) 2 Gall. 398, has not prevailed in the United States, where not locality, but the nature and the subject matter of the contract, i. e., whether it has reference to a maritime transaction, is made the controlling criterion. *The Richard Winslow* (1896) 71 Fed. 426; *Ins. Co.* v. *Dunham, supra.* A logical construction of this test would give admiralty jurisdiction over charter parties, *Morewood* v. *Enequist* (1859) 23 How. U. S. 491, while denying it in the case of brokerage. *The Humboldt* (1898) 86 Fed. 351; *Richard* v. *Hogarth* (1899) 94 Fed. 684, the former being clearly maritime, while the latter is merely a preliminary contract leading eventually to the formation of one of a maritime nature. The principal case recognizes this distinction and correctly regards the novel facts as constituting an action based on a charter party.

ADMIRALTY—TORTS RESULTING IN DEATH—STATE STATUTES.—Two vessels, registered in Delaware, and owned by Delaware corporations, collided on the high seas and the plaintiff's intestate was killed. Negligence was found. *Held,* the Delaware statute providing for an action resulting in death would be applied in admiralty. *Old Dominion S. S. Co.* v. *Gilmore,* U. S. Supreme Court, December 23, 1907.

The principles applying to this case, now adopted by the Supreme Court, are developed in a note in 5 COLUMBIA LAW REVIEW 234.

CARRIERS—INJURY TO PASSENGER—INDEPENDENT CONTRACTOR.—A railroad employed an independent contractor to clean its cars. While being hauled away by the contractor, a car broke loose and collided with the car in which the plaintiff was riding and injured him. *Held,* the railroad was not liable for the negligence of the contractor. *Beckman* v. *Meadville etc. Ry. Co.* (Pa. 1907) 67 Atl. 983.

No duties involved in the safe transportation of passengers may be delegated to an independent agent so as to relieve the carrier from liability, *Barrow* v. *Kane* (1898) 88 Fed. 197; *Carrico* v. *W. Va. etc. Ry.* (1894) 39 W. Va. 86; *Chicago etc. Ry. Co.* v. *Rhodes* (1904) 35 Tex. Civ. App. 432, nor can it, by delegation to an independent contractor, escape liability to other persons while engaged in the performance of a statutory duty, *Railroad Co.* v. *Heflin* (1872) 65 Ill. 366; *Hole* v. *Sittingbourne etc. Ry.* (1861) 6 Hurl. & N. 488, nor where its work involves obstruction of the public highway. *T. B. & H. Ry. Co.* v. *Warner* (1895) 88 Tex. 642; *Chicago Bridge Co.* v. *La Manita* (1904) 112 Ill. App. 43. In Illinois the question depends on whether the work is part of the chartered powers. *Boyd* v. *Chicago etc. Ry.* (1905) 217 Ill. 332. Otherwise, however, a common carrier is not liable for the acts of its independent contractor to any greater extent than an individual. *Eaton* v. *Railroad* (1871) 59 Me. 520;

City Ry. Co. v. *Moores* (1895) 80 Md. 348. Since the cleaning of its cars was a separate and distinct function and in no way affected the safe carriage of passengers, there seems to be no good reason why a carrier cannot delegate such work to an independent contractor so as to escape liability for his negligence.

CONFLICT OF LAWS—NEGOTIABLE PAPER—NECESSITY OF PROTEST.—A foreign bill of exchange was endorsed by the drawers to bankers in New York who sent it to their agent in Vienna for collection. The agent failed to protest the bill on the refusal of the drawees to pay, or to give notice to the drawers as required by the laws of New York. *Held*, the drawers were discharged, though under the laws of Austria no protest was necessary. *Amsinck* v. *Rogers* (N. Y. 1907) 82 N. E. 134. See NOTES, p. 135.

CONSTITUTIONAL LAW—DENIAL OF PRIVILEGE—DENIAL OF WRONGFUL DEATH ACTION.—The widow of a citizen of Pennsylvania sued in Ohio on the right of action given by Pennsylvania for the death of her husband. A statute of Ohio gave its courts jurisdiction in such actions only when the death was that of a citizen of Ohio. *Held*, that the statute did not accord to citizens of Ohio any privilege denied to citizens of other states. *Chambers* v. *Baltimore & Ohio R. R.* (U. S. 1907) 28 Sup. Ct. 34. See NOTES, p. 132.

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT—EXCLUSION OF FOREIGN CORPORATION.—Under an act according to foreign corporations complying with certain conditions the privilege of doing business within the state, subject only to the requirements imposed upon domestic corporations, the defendant extended its line through the state and acquired valuable property therein. Subsequently a statute was enacted providing that any foreign corporation which should remove a suit from a state into a federal court should thereby forfeit the right to do business within the state. *Held*, as applied to the defendant, the statute was unconstitutional. *Chicago, R. I. & Pac. Ry. Co.* v. *Ludwig* (C. C. Ala. 1907) 156 Fed. 152.

The power to impose conditions upon the right of a foreign corporation to enter, *Bank of Augusta* v. *Earle* (1839) 13 Pet. 519; *Paul* v. *Virginia* (1868) 8 Wall. 168, or continue to do business within a state, *Sandel* v. *Atl. Life Ins. Co.* (1898) 53 S. C. 241, extends even to conditions in themselves unconstitutional. *Sec. Mut. Life Ins. Co.* v. *Pewitt* (1905) 202 U. S. 246; *Doyle* v. *Cont. Ins. Co.* (1876) 94 U. S. 535. See 5 COLUMBIA LAW REVIEW 231. But in some cases a contract is found between the state and the corporation defining the terms of admission, in which case no further condition may be imposed, *Brit. Am. Mort. Co.* v. *Jones* (S. C. 1897) 56 S. E. 983; *Com.* v. *Mobile & O. R. R. Co.* (Ky. 1901) 64 S. W. 451, except reasonable requirements under the police power. *Erie R. R. Co.* v. *Pennsylvania* (1894) 153 U. S. 628, 644. The payment of a license fee will constitute a consideration for the contract, *Am. Smelt. Co.* v. *Colorado* (1907) 204 U. S. 103; *Brit. Am. Mort. Co.* v. *Jones, supra*, or, as in the principal case, expenditure in reliance on the authorization given by the state. *Com.* v. *Mobile & O. R. R. Co., supra.*

CONSTITUTIONAL LAW—RESERVED RIGHT TO AMEND—WEEKLY PAYMENT ACTS.—An act of the legislature required mining, manufacturing, mercantile, telegraph, telephone and transportation corporations and incorporated express, water and electric light and power companies, to pay their employees weekly and in lawful money. *Held*, it was constitutional. *Lawrence* v. *Rutland R. Co.* (Vt. 1907) 67 Atl. 1091.

While laws fixing the time for payment of employees stand upon the same basis as those dealing with the medium of payment, see 7 COLUMBIA LAW REVIEW 617, and are unjustifiable under the police power, *Republic Iron and Steel Co.* v. *State* (1903) 160 Ind. 379, the theory of the principal case, sustaining both as to corporations under the reserved power to amend corporate charters, is within the rulings of both federal, *St. Louis etc. Ry.*

Co. v. *Paul* (1899) 173 U. S. 404; *Skinner* v. *Garnet Gold Mining Co.* (1899) 96 Fed. 735, and state courts. *Shaffer* v. *Union etc. Co.* (1880) 55 Md. 74; *State* v. *Browne & Sharpe Mfg. Co.* (1892) 18 R. I. 16; *Leep* v. *Ry. Co.* (1894) 58 Ark. 47; contra, *Johnson* v. *Goodyear Mining Co.* (1899) 127 Cal. 4. The Illinois decisions rest upon a specific constitutional provision. *Braceville Coal Co.* v. *People* (1893) 147 Ill. 66. Since the statute in the principal case applies to substantially all corporations it cannot be deemed an arbitrary exercise of the reserved power, cf. *Leep* v. *St. Louis etc. Ry. Co., supra;* contra, *Braceville Coal Co.* v. *People, supra,* and consequently does not deny to the defendant the equal protection of the laws. *Stearns* v. *Minnesota* (1900) 179 U. S. 223, 259.

CONTRACTS—RESCISSION FOR FRAUD—INSURANCE.—The plaintiff sued for the rescission of an insurance contract for fraud by the insurer at its inception. *Held,* upon a cancellation of the policy he could recover all the premiums paid with interest without any deduction for the risk carried. *Moore* v. *Mut. Reserve Fund Life Association* (1907) 106 N. Y. Supp. 255. See NOTES, p. 123.

CORPORATIONS—AMENDMENT OF CHARTER—RATIFICATION OF ULTRA VIRES CONTRACT.—A benefit insurance company issued a policy to the plaintiff which was ultra vires of the company. The plaintiff paid the premiums for a number of years. The company was then reorganized with power to issue such policies, and the prior act ratified. *Held,* the previous want of power was cured. *Wineland* v. *Knights of Maccabees* (Mich. 1907) 112 N. W. 696.

On the theory that an ultra vires act is void, *Cent. Trans. Co.* v. *Pullman's P. Car Co.* (1891) 139 U. S. 24, there could, of course, be no ratification; *Tullock* v. *Webster County* (1895) 46 Neb. 211; *Downing* v. *Mt. Wash. Road Co.* (1860) 40 N. H. 230; and the amendment with subsequent action would have to be construed as evidence of a new agreement. Cf. *McCracken* v. *San Francisco* (1860) 16 Cal. 591. If the theory be adopted that the right to plead ultra vires rests with the corporation as trustee for its stockholders, 7 COLUMBIA LAW REVIEW 196, the acceptance of the amended charter might be considered as a waiver of any objections on their part to a contract previously made coming within the new terms, and extending into the future. By this view, however, as applied in New York, *Bath Gas Light Co.* v. *Claffy* (1896) 151 N. Y. 24, and New Jersey, *Camden Ry. Co.* v. *Mays Landing Ry. Co.* (1886) 48 N. J. L. 530, they would also be estopped in the principal case because the corporation had received the full benefit of the contract. Cf. 7 COLUMBIA LAW REVIEW 428.

CORPORATIONS—PURCHASE OF STOCK IN SIMILAR CORPORATIONS—MONOPOLY.—Suit was brought to dissolve a gas manufacturing corporation, alleging abuse of its corporate privileges in creating a monopoly by the purchase of stock in similar corporations. *Held,* that under the New York law a monopoly so created was legal. *In re Consolidated Gas Co.* (1907) 106 N. Y. Supp. 407.

An injunction was asked prohibiting the transfer of stock of certain city railroads to a corporation organized to purchase such stock. *Held,* that the New York law prohibited a corporation from purchasing the stock of other corporations to the extent of creating a monopoly. *Burrows* v. *Interborough-Metropolitan Co.* (C. C. S. D. N. Y. 1907) 156 Fed. 389.

When the purchasing corporation is formed to effect a consolidation of existing corporations, a monopoly so formed is generally declared illegal. *Atty. Genl.* v. *Booth & Co.* (1906) 143 Mich. 80; *Northern Sec. Co.* v. *U. S.* (1904) 193 U. S. 197; *People* v. *Chicago Gas Trust Co.* (1889) 130 Ill. 268. Monopolies formed by purchasing stock of corporations engaged in the same business are open to the same objections, and have also been declared illegal. *Cent. Ry.* v. *Collins* (1869) 40 Ga. 582; *Langdon* v. *Branch* (1888) 37 Fed. 449. But the *Consolidated Gas Co.* case evades this rule by construing the power to purchase stock in similar corporations, given by the Stock Corporation Law, Laws of N. Y. 1892, c. 688 § 40, as unlimited by the Anti-

Monopoly Law, Laws N. Y. 1896, c. 383. The case relied upon, *Rafferty* v. *Buffalo City Gas Co.* (N. Y. 1899) 37 App. Div. 618, did not involve the creation of a monopoly. The *Interborough-Metropolitan* case considers the power given in § 40 of the Stock Corporation Law, *supra,* as limited by § 7 of the same act, prohibiting the carrying of such purchases to the extent of creating a monopoly. *People ex rel. Am. Ice Co.* v. *Nussbaum* (N. Y. 1900) 32 Misc. 112, construes the Anti-Monopoly Law, *supra,* as having the same effect. These constructions seem the more reasonable. While, as pointed out in the *Consolidated Gas Co.* case, the state may control the service given by public service corporations, and the prices charged, Laws of N. Y. 1905, c. 737 § 11; Laws of N. Y. 1907, c. 429 §§ 26, 49, 72, so that some of the objections to monopolies do not apply to them, yet the enactments make no exception in their favor.

Criminal Law—Homicide—Principal.—The defendant and another pursued the deceased, and jumped on him together, each stabbing him. No evidence of prior conspiracy was present. *Held,* since both were present, assisting in and assenting to the crime, it was not necessary to a conviction to show that death ensued from the particular acts of the defendant. *McCoy* v. *State* (Miss. 1907) 44 So. 814.

Where several conspire to effect death, each engaged in the common undertaking is a principal and is criminally responsible, regardless of whose act resulted in the homicide. Whether the offense be murder or manslaughter is immaterial. *Martin* v. *State* (1889) 89 Ala. 115; *Ruloff* v. *People* (1871) 45 N. Y. 213; 2 Hawk., P. C., Ch. 29, sec. 8. *A fortiori,* also, where there is simply nothing in the evidence to show who struck the fatal blow. *Green* v. *State* (1889) 51 Ark. 189; *People* v. *Flanigan* (1903) 174 N. Y. 356. Similar conclusions follow where, though there was no previous conspiracy, the defendant was present, assenting, aiding, and participating in the offense. *State* v. *Hermann* (1893) 117 Mo. 629; *Regina* v. *Price* (1858) 8 Cox C. C. 96. In most but not necessarily in all cases of this kind, there is evidence of a conspiracy entered into on the exigency of the occasion. *State* v. *Penney, supra; People* v. *Wilson* (1895) 145 N. Y. 628, 632. Of course, no liability attaches if the homicide results from the unconnected acts of a third party, neither participated in, nor assented to, by the defendant. *Woolweaver* v. *State* (1893) 50 Oh. St. 277; *People* v. *Woody* (1873) 45 Cal. 289.

Damages—Exemplary Damages—No Actual Damages.—The defendant maliciously instituted an action against the plaintiff in a foreign jurisdiction. A suit for an injunction and damages was brought. *Held,* in the absence of actual damage, no exemplary damages would be awarded. *Lightfoot* v. *Murphy* (Tex. 1907) 104 S. W. 511.

Exemplary damages are given as compensation by way of atonement for the infringement of a private right, as the contempt with which it has been treated increases the injury by rendering the right less inviolate. 7 Columbia Law Review 122. Some courts, however, allow them rather as an example to deter others; *Brown* v. *Swineford* (1878) 44 Wis. 282; or on the ground of punishment. *Craven* v. *Bloomingdale* (1902) 171 N. Y. 439. According to either theory, exemplary damages should be allowed under proper circumstances for the infringement of a right which would ordinarily call for nominal damages only. *Ala. G. So. R. R. Co.* v. *Sellers* (1890) 93 Ala. 9; *Press Pub. Co.* v. *Monroe* (1896) 73 Fed. 106; *Beaudrot* v. *Ry. Co.* (1903) 69 S. C. 160. In Illinois, where the rule of the principal case is followed, actual damages are implied, if the violation of the plaintiff's right was malicious. *Blanchard* v. *Burbank* (1885) 16 Ill. App. 375. The result in the principal case may, however, be supported in that the action was in the nature of malicious prosecution to which actual damage is a necessary element. *Savill* v. *Roberts* (1698) 12 Mod. 208.

Domestic Relations—Ante-Nuptial Settlements—Failure of Consideration.—An intended wife by an ante-nuptial contract relinquished all her

rights as heir or otherwise in the property of her intended husband. He failed to perform as to material covenants. *Held*, that she may claim her rights as heir. *In re Warner's Estate* (Cal. 1907) 92 Pac. 191.

At common law ante-nuptial agreements, except for a jointure under St. 27 Henry VIII, c. 10, were unenforcible; see 7 COLUMBIA LAW REVIEW 203; since they could not act as a release, dealing with non-existent rights, *Mann* v. *Mann's Estate* (1880) 53 Vt. 48, nor, being executory, as an estoppel. *Gibson* v. *Gibson* (1818) 15 Mass. 106. Always enforcible in equity, *Andrews* v. *Andrews* (1830) 8 Conn. 79, they are now, because of the dissolution of the marriage entity by statute, enforcible also at law, *Wentworth* v. *Wentworth* (1879) 69 Me. 247, subject to a very rigid scrutiny as to fairness. *Pierce* v. *Pierce* (1877) 71 N. Y. 154; *Kline* v. *Kline* (1868) 57 Pa. St. 120. In some states certain statutory provisions aimed to protect the widow and offspring cannot be barred; e. g. temporary support, *Building* v. *Durfee* (1891) 85 Mich. 34, and the widow's reward; *Phelps* v. *Phelps* (1874) 72 Ill. 545; while others, e. g. homestead rights, *Warner* v. *Warner* (1904) 144 Cal. 615, are barred only by express words. If there is a failure to perform in material covenants, the contract cannot be set up as a bar. *Hastings* v. *Dickinson* (1810) 7 Mass. 153; *Brenner* v. *Gauch's Exr.* (1877) 85 Ill. 368. The principal case seems sound and is in accord with authority.

EMINENT DOMAIN—IMPROVEMENTS BY CONDEMNOR.—The owner of land without objection, permitted the erection of a public schoolhouse. *Held*, in condemnation proceedings, the value of the improvements could not be included in the recovery. *McLaurin* v. *Jefferson School P. P.* (Ind. 1907) 82 N. E. 73.

The rule that one placing improvements on another's land loses their value is applied to condemnors acting ultra vires. *Price* v. *Weehawken Ferry Co.* (1879) 31 N. J. Eq. 31. An exception is made where the entry is effected with power and intention to condemn but neglecting some statutory provision; in which event the landowner need not be compensated for the improvements. *Justice* v. *Nesquehong Valley R. R.* (1878) 87 Pa. St. 28; *Newgass* v. *Ry. Co.* (1891) 54 Ark. 140; contra *Village of St. Johns* v. *Smith* (1906) 184 N. Y. 346. Courts frequently dispose of these cases on doctrines of implied assent. *Goodwin* v. *Canal Co.* (1868) 18 Oh. St. 169; *Dietrich* v. *Murdock* (1868) 42 Mo. 279; *Jones* v. *New Orleans Ry.* (1881) 70 Ala. 227. Other courts have held similarly because the presumption of the dedication of the improvements to the landowner is rebutted by the quasi-public nature of the trespasser's power to condemn. *Louisville R. R.* v. *Dickson* (1885) 63 Miss. 380; *Jacksonville-Tampa R. R.* v. *Adams* (1891) 28 Fla. 631; *Justice* v. *Nesquehong Valley R. R., supra.* The logical view advanced is that condemnation actions are special proceedings to which the rules of common law are not applicable, Lewis, Em. Domain § 507, and in which the aim of the court is to give compensation, which is just, *Searl* v. *School District* (1890) 133 U. S. 553; *Greve* v. *1st Div. of R. R.* (1879) 26 Minn. 66, so that the landowner is recompensed only for damages he has in fact sustained. *Jacksonville Ry.* v. *Adams, supra,* 638; *Aldridge* v. *Board of Educ.* (1905) 15 Okl. 354, 358. The cases contra ignore the peculiar nature of condemnation proceedings and apply strictly the rule as to tort feasor's erections.

EVIDENCE—ADMISSIONS—TESTIMONY IN A FORMER ACTION OR PROCEEDING.—The testimony of the vice-president and southern manager of the defendant corporation had been taken in another case by interrogatories. These interrogatories and answers were offered by the plaintiffs to show admissions of material facts. *Held*, that they were inadmissible on the grounds that the agents had no authority to make the admissions for the principal, and that there was no express or implied adoption of them by the defendant. *Sizer & Co.* v. *Melton & Sons* (Ga. 1907) 58 S. E. 1055. See NOTES, p. 132.

EVIDENCE—EMINENT DOMAIN—DAMAGES.—A strip was condemned dividing the appellant's tract into two parcels, one of which was occupied by its

factory, and the other, vacant. Plans were introduced in evidence to show the necessity of the factory's expansion across the condemned strip to the vacant parcel. On cross-examination of the appellant's president it was brought out that for several months it had been financially embarrassed. *Held*, the cross-examination should go to the jury on the question of damages. *Bradley Mfg. Co.* v. *Chicago etc. Tract. Co.* (Ill. 1907) 82 N. E. 210.

The measure of damages is the market value of the land taken, in view of the uses for which it is available; *Miss. R. Bridge Co.* v. *Ring* (1874) 58 Mo. 491; circumstances being admissible to show long use by an established business, *King* v. *Minneapolis Ry. Co.* (1884) 32 Minn. 224, or special adaptability to a certain business, *Boom Co.* v. *Patterson* (1878) 98 U. S. 403, or proximity to water power; *Maynard* v. *Northampton* (1892) 157 Mass., 218; and in addition, if but part is taken, damages for the remainder. *Matter of The Mayor* (N. Y. 1899) 39 App. Div. 589. Also the plans of a proposed structure, or the unrecorded plat of the land into lots, may be shown to prove the capabilities of the land; *Chicago Ry. Co.* v. *Blake* (1886) 116 Ill. 163; *Ry. Co.* v. *Longworth* (1876) 30 Oh. St, 108; but the intention of the owner as to its future use cannot be shown, as it does not prove its availability at the present time. *Pinckham* v. *Chelmsford* (1872) 109 Mass. 225. On principle, therefore, it would seem that the cross-examination was improper, as the pecuniary condition of the present owner could have no bearing on the availability of the land for the expansion of the factory; but it seems that the present financial condition of the business itself would be relevant, as negativing the need of expansion, and hence the availability of the tract for that use; or it might be admissible as discrediting the witness.

EVIDENCE—PRESUMPTION OF LAW AS EVIDENCE.—The trial court refused to charge that the legal presumption of undue influence was itself a piece of evidence to overcome the counterproof. *Held*, error. *In re Roger's Will* (Vt. 1907) 67 Atl. 726. See NOTES, p. 127.

EVIDENCE—PRIVILEGED COMMUNICATION—EXTENT OF WAIVER.—The plaintiff, having suffered a prior accident, was later injured by the defendant's negligence. She and her physicians testified to the character and treatment of the resulting injuries, but pleaded privilege as to questions touching the consequences of the prior accident. *Held*, such testimony was privileged. *Dambmann* v. *Met. St. Ry. Co.* (1907) 106 N. Y. Supp. 222.

On the authorities the principal case is sound. The privilege affecting disclosures to a physician is waived by the patient's testifying to the details of the communication; *Webb* v. *Met. St. Ry.* (1901) 89 Mo. App. 604; but not by the mere act of becoming a witness; cf. *Hemenway* v. *Smith* (1856) 28 Vt. 21; *Dittenhoffer* v. *State* (1877) 34 Oh. St. 91; contra, *Inhabitants of Woburn* v. *Kenshaw* (1869) 101 Mass. 113; nor by bringing suit, *Smart* v. *Kansas City* (Mo. 1907) 105 S. W. 709, 714, though much is to be said contra. 4 Wigmore, Evid. § 2389. The extent of the waiver depends on the minuteness with which the patient testifies as to the consultations, *Rauh* v. *Verein* (1898) 29 App. Div. 483; *Webb* v. *Met. St. Ry., supra; Hennesey* v. *Kelley* (1901) 55 App. Div. 449; contra, *Green* v. *Town of Nebegamain* (1902) 113 Wis. 508; but see *Powers* v. *Met. St. Ry. Co.* (1905) 105 App. Div. 358. Should the waiver be based on the patient's calling the physician as a witness, *Sovereign Camp* v. *Grandon* (1902) 64 Neb. 34, its extent rests on the scope of his direct examination; *Butler* v. *Man. Ry.* Co. (N. Y. 1893) 30 Abb. N. C. 78; *Miller* v. *Mo. Pac. R. R.* (1891) 105 Mo. 455; except that failure to object to questions on cross-examination may constitute a waiver. *Lissak* v. *Crocker Estate* (1897) 109 Cal. 442. The privilege as to several physicians is not waived by calling one, *Baxter* v. *Cedar Rapids* (1897) 103 Ia. 599; except when all were consulted simultaneously. *Morris* v. *R. R. Co.* (1896) 148 N. Y. 88, 92. The courts have construed the statutes creating the privilege, e. g. N. Y. Code Civ. Pro. § 834, liberally, *Edington* v. *Mutual Life Ins. Co.* (1876) 67 N. Y. 185, although admitting the injustice often

incidental thereto. *Renihan* v. *Dennin* (1886) 103 N. Y. 573. Conceding the policy of the statute, which is questionable, the choice appears to be between regarding the waiver as complete, thus laying open the patient's whole private life, or construing the waiver strictly.

INSURANCE—CONDITION—NOTICE—DELIVERY OF POLICY AFTER ACCIDENT.—After employer's liability insurance, provided for in a covering note without conditions, had gone into effect, but a week before delivery of the policy, an employee was injured. The policy provided for notice; but no notice was given for two months, and then only the day before the employee's death. *Held*, Fletcher Moulton, L. J., dissenting, as the employer neither knew, nor had the opportunity to know of the condition at the time of the accident, he was not bound by it. *In re Coleman's Depositories, Ltd.* [1907] 2 K. B. 798.

Where a policy calls for "immediate" notice it is construed to mean that notice shall be given within a reasonable time according to all the circumstances of the case. *Solomon* v. *Continental Ins. Co.* (1899) 160 N. Y. 595; *Williams* v. *Lancashire Ins. Co.* (1902) 19 Times L. R. 82; *Niagara Ins. Co.* v. *Scannon* (1881) 100 Ill. 644. In at least some of the United States where there are standard policies, when no policy is issued or delivered, if there is no mention of conditions in the application, the usual conditions of the usual policy are presumed to be meant and are binding on the parties. *De Grove* v. *Metropolitan Ins. Co.* (1875) 61 N. Y. 594, 602; *Smith* v. *State Ins. Co.* (1884) 64 Ia. 716; *Home Ins. Co.* v. *Favorite et al.* (1867) 46 Ill. 265, 268. According to this doctrine the employer in the principal case would be effected with notice and be bound to comply with the condition within a reasonable time after the accident. But even if this doctrine is rejected notice should have been given within a reasonable time after delivery of the policy. *Matthews* v. *Am. Ins. Co.* (1897) 154 N. Y. 449; *Bennett et al.* v. *Lycoming Ins. Co.* (1876) 67 N. Y. 274; contra, *Anoka Lumber Co.* v. *Ins. Co.* (1895) 63 Minn. 286. Such conditions if binding are generally held to be conditions precedent to a right to recover on the policy. *Brown* v. *London Ass. Co.* (N. Y. 1886) 40 Hun 101; *Missouri Pac. Ry.* v. *Western Ass. Co.* (1904) 129 Fed. 610. The principal case, therefore, seems unsound.

INSURANCE—MUTUAL BENEFIT SOCIETY—CHANGE OF BENEFICIARY.—A member of a mutual benefit association contracted to appoint the plaintiff his beneficiary and vested in her the possession of the membership certificate containing the provision that the beneficiary might be changed at will. *Held*, these provisions did not apply, as the plaintiff had been appointed beneficiary for a valuable consideration. *Strong* v. *Supreme Lodge K. P.* (N. Y. 1907) 82 N. E. 433.

A beneficiary gratuitously designated, analogous to a legatee, has no standing to complain if the designation be changed; *Hoeft* v. *Supreme Lodge Knights of Honor* (1896) 113 Cal. 91; *Splawn* v. *Chew* (1883) 60 Tex. 532; *Manning* v. *Ancient Order of the United Workingmen* (1887) 86 Ky. 136; but if the beneficiary be appointed for a valuable consideration he acquires vested rights of which he cannot be deprived by a further exercise of the power to appoint. *Smith* v. *Nat'l Ben. Soc.* (1890) 123 N. Y. 85; *Webster* v. *Welch* (N. Y. 1901) 57 App. Div. 558; *Conselyea* v. *Supreme Council* (N. Y. 1896) 3 App. Div. 464. This result has been reached on a balance of equities, cf. *Jory* v. *Supreme Council Amer. Legion of Honor* (1894) 105 Cal. 20, and on the questionable ground of estoppel. *Webster* v. *Welch, supra.* The principal case may also be supported on the ground that membership certificates will be treated as analagous to wills, *Chartrand* v. *Bruce* (1891) 16 Colo. 19; *Thomas* v. *Leake* (1887) 67 Tex. 469, and since a contract to make one his legatee will be enforced, *Bolman* v. *Overall* (1886) 80 Ala. 451; *Nowack* v. *Berger* (1895) 133 Mo. 24, so here an agreement to make one his beneficiary might be similarly treated.

LANDLORD AND TENANT—COVENANT AGAINST ASSIGNMENT—RESERVATION OF RIGHT OF ENTRY.—The defendant lessee under a lease containing a covenant

against assignment executed a lease to a third party of the premises for the same term and on the same conditions as the original lease, but reserving a right of entry for non-payment of rent. *Held*, Ingraham, J., dissenting, this constituted an assignment. *Herzig* v. *Blumenkrohn* (1907) 38 N. Y. Law Jour., No. 63.

Unless the original lessee has left in himself some reversion, *Woodhull* v. *Rosenthal* (1875) 61 N. Y. 382, the instrument constitutes an assignment though in form a sublease. 1 Taylor, Landl. & Ten. § 16. A right of re-entry is not an interest in the land, nor does it imply the reservation of a reversion; *Doe* v. *Bateman* (1818) 2 Barn. & Ald. 168; it is a mere chose in action. *Sexton* v. *C. S. Co.* (1889) 129 Ill. 318. The principal case is, therefore, correctly decided, and is supported by the weight of authority. *Craig* v. *Simmons* (1891) 47 Minn. 189; *Floyd* v. *Cosens* (Pa. 1830) 2 Ashm. 138. *Collins* v. *Hasbrouck* (1874) 56 N. Y. 162, frequently cited contra is distinguishable on its facts. See *Stewart* v. *R. R. Co.* (1886) 102 N. Y. 618.

Landlord and Tenant—Lateral Support for Buildings—New York Building Code.—The defendant, owning two adjoining pieces of property, made an excavation in one which caused the building on the other to collapse. His tenant in the building sued under § 22 of the Building Code for damages. *Held*, the Building Code applied only to adjoining owners and not as between landlord and tenant. *Paltey* v. *Egan* (N. Y. 1907) 38 N. Y. Law Jour., No. 62.

A tenant can sue for injury to the premises either by reason of his occupation, *Austin* v. *Hudson R. R. Co.* (1862) 25 N. Y. 334, or because of his liability for waste; *Attersol* v. *Stevens* (1808) 1 Taunt. 183, 198; *Cook* v. *Champlain Trans. Co.* (N. Y. 1845) 1 Den. 91; but cannot recover for damages to the reversion. *Foley* v. *Wyeth* (Mass. 1861) 2 Allen 131. By analogy it has therefore been held that the Building Code gives a right to a lessee as against a stranger. *Cohen* v. *Simmons* (1892) 21 N. Y. Supp. 385, affd. (1894) 142 N. Y. 671. The tenant, however, has a right also against his landlord. Any act of the landlord which causes the demised premises to be unsafe or impossible of occupancy, *Snow* v. *Pulitzer* (1894) 142 N. Y. 263, amounts to an eviction. 8 Columbia Law Review 55. For an invasion of possession not amounting to eviction the tenant has an action either on the breach of an express or implied covenant of quiet enjoyment, *Abrams* v. *Watson* (1877) 59 Ala. 524, or, if a mere wrongful entry, in trespass *quare clausum*. *Dickinson* v. *Goodspeed* (Mass. 1851) 8 Cush. 119; *Avery* v. *Dougherty* (1885) 102 Ind. 443. A proper construction of the ordinance in the light of the common law would thus seem to afford a remedy as between landlord and tenant.

Municipal Corporations—Encroachments on Street—Estoppel.—Plats for a city addition were filed in 1853. Thereafter steel mills encroaching on the streets of this addition were erected. During forty years the City stood by, while the proprietors expended large sums, believing the streets to have been abandoned. *Held*, the City was estopped from treating the buildings as obstructions. *City of Chicago* v. *Illinois Steel Co.* (Ill. 1907) 82 N. E. 286.

The Statute of Limitations does not run against state agencies, 7 Columbia Law Review 290, but in some states the doctrine of equitable estoppel may be invoked. *Corey* v. *City of Ft. Dodge* (1902) 118 Ia. 742; *Simplot* v. *Ry. Co.* (1883) 16 Fed. 361. The latter principle is not applied to the state, *People* v. *Brown* (1873) 67 Ill. 435; *State* v. *Bevers* (1882) 86 N. C. 588, nor to a municipal corporation in its governmental capacity when the estoppel is sought to be raised from acts of unauthorized agents, *City of Uniontown* v. *Berry* (Ky. 1903) 72 S. W. 295, or ultra vires transactions. *Snyder* v. *Mt. Pulaski* (1898) 176 Ill. 397. Since the city holds title to streets in trust for a public use, *City of New York* v. *Trust Co.* (N. Y. 1905) 104 App. Div. 223, the cases permitting an estoppel must be regarded as anomalous. Dillon, Mun. Corp., 4th Ed. § 667. Furthermore mere silence, unless it implies consent, *Baker* v. *Humphreys* (1879) 101 U. S.

494, will not ground an estoppel. *Ackerman* v. *True* (1903) 175 N. Y. 353. And when the estoppel relates to the title to real property, the party claiming thereunder must have been destitute not only of knowledge of the true state of the title, but also of convenient means of acquiring such knowledge. *Brant* v. *Virginia* (1876) 93 U. S. 326. As the facts of the principal case would not justify an estoppel even as between individuals, the decision seems erroneous.

MUNICIPAL CORPORATIONS—STREETS—CONSTRUCTION OF WALKS.—A strip thirty feet wide was dedicated for ordinary street purposes. The city council had not defined the space in the streets to be used as a carriage way or for sidewalks. The defendant constructed a pavement four feet wide. *Held*, that the city could not restrain its construction. *City of Georgetown* v. *Hambrick* (Ky. 1907) 104 S. W. 997.

Cities have the power to control and regulate streets by ordinance or by-law, *State, Taintor pros.* v. *Mayor etc. of Morristown* (1868) 33 N. J. Law 57; *Commonwealth* v. *Beaver et al.* (1895) 171 Pa. St. 542, subject to the paramount authority of the state, *Southwark R. R. Co.* v. *City of Phila.* (1865) 47 Pa. St. 314, and the purposes of the dedication. *Price et al.* v. *Thompson et al.* (1871) 48 Mo. 361; *Lexington etc. R. R. Co.* v. *Applegate* (Ky. 1839) 8 Dana 289. This power of regulation must be exercised reasonably and is subject to review by the courts. *State* v. *Mayor etc. of Jersey City* (1875) 37 N. J. Law 348. An abutting owner has the right to a reasonable use of the street and is entitled to an injunction against a wrongful appropriation of it, *Shaufele* v. *Doyle* (1890) 86 Cal. 107; *Lexington etc. R. R. Co.* v. *Applegate, supra*, and may make any use of the highway not inconsistent with the public easement or any ordinance. *Allen* v. *Boston* (1893) 159 Mass. 324; *McCarthy* v. *City of Syracuse* (1871) 46 N. Y. 194. The principal case seems sound; but see *Brevoort* v. *Detroit* (1872) 24 Mich. 322.

QUASI-CONTRACTS—LIMITATION OF ACTIONS—NEW PROMISE.—The defendant had fraudulently represented land sold to the plaintiff as unencumbered. Actions in tort and quasi-contract were barred by limitations; but in an action in quasi-contract a written promise to pay made within five years was proved. *Held*, the basis of the action being a tort, the action was barred. *Nelson* v. *Peterson* (Ill. 1907) 82 N. E. 229.

Permitting an acknowledgment of an outlawed indebtedness to toll the statute, though perhaps expedient, Wood, Limitations, 160; but see *Hellings* v. *Shaw* (1817) 7 Taunt. 608, 611, was judicial legislation, *Baillie* v. *Sibbald* (1808) 15 Vesey, Jr. 185; *A'Court* v. *Cross* (1825) 3 Bing. 329, 333, growing out of an aversion to limitations. *Bell* v. *Morrison* (U. S. 1828) 1 Pet. 351. This anomalous doctrine is not confined to strict common law debts, *Gibbons* v. *M'Casland* (1818) 1 B. & Ald. 690; *Wetzell* v. *Bussard* (1826) 11 Wheat. 309, 316; Wood, Limitations, 166, as sometimes stated; *Whitehead* v. *Howard* (1820) 2 Brod. & Bing. 372, 378; though it is restricted to promises to pay a sum of money. *Boydell* v. *Drummond* (1808) 2 Campb. 157. Thus, no admission can revive the right of action for the performance of an act, *Boydell* v. *Drummond, supra;* cf. *Wetzell* v. *Bussard, supra,* or for a tort. *Oothout* v. *Thompson* (N. Y. 1822) 20 Johns. 277; *Peterson* v. *Breitag* (1893) 88 Ia. 418. The best working theory is to regard the new promise, supported by the moral consideration of an antecedent obligation unenforceable by reason of a statutory bar, as the cause of action. *Mills* v. *Wyman* (Mass. 1825) 3 Pick. 207; *Carshore* v. *Huyck* (N. Y. 1849) 6 Barb. 583, 586; Buswell, Limitations, 51. Some authority, *Betton* v. *Cutts* (1840) 11 N. H. 170, supports the suggestion, Wald's Pollock, Contracts, Williston's Ed. 201, 777, that the acknowledgment is only a waiver of the statutory defense, but this has been severely criticized. 16 Harv. L. R. 517; cf. *Dusenbury* v. *Hoyt* (1873) 53 N. Y. 521. The principal case, tested by these general considerations, is logically unsound. The tort itself is distinguishable from the promise implied in law to reimburse; Keener, Quasi-Contracts, 159; *Cooper* v. *Cooper* (1888) 147 Mass. 370; and the decided weight

of authority recognizes that the quasi-contract action may be maintained though the tort action for the same cause is outlawed. *Moses* v. *Taylor* (D. C. 1888) 6 Mackey 255; *Lamb* v. *Clark* (Mass. 1827) 5 Pick. 193; *Hony* v. *Hony* (1824) 1 Sim. & Stu. 568.

QUASI-CONTRACTS—MONEY RECEIVED—TRANSFER OF DEPOSIT.—The defendant by means of a non-negotiable order, drawn by the plaintiff but never delivered by him, wrongfully procured the transfer to her account of the plaintiff's deposit in a savings bank. *Held,* the plaintiff might recover for money had and received. *Earle* v. *Whiting* (Mass. 1907) 82 N. E. 32. See NOTES, p. 125.

REAL PROPERTY—COVENANT AGAINST INCUMBRANCES—RUNNING WITH THE LAND—LIMITATIONS.—The plaintiff was forced to pay a mortgage on property, which he held, through mesne conveyances, from the deceased who had made a covenant against incumbrances, four years after the time for filing claims against the estate had elapsed. *Held,* the covenant ran with the land; and the action was not barred. *In re Hanlin's Estate* (Wis. 1907) 113 N. W. 411.

Since this covenant is *in præsenti,* it is broken when made if there is an incumbrance on the property and, merging in the chose in action cannot, at common law, run with the land. *Thayer* v. *Clemence* (Mass. 1839) 22 Pick. 490; contra, *Myers* v. *Brodbeck* (1885) 110 Pa. St. 198. Yet only nominal damages are recoverable, *Eaton* v. *Lyman* (1872) 30 Wis. 41, until the grantee is forced to pay off the incumbrance, *Wyatt* v. *Dunn* (1887) 93 Mo. 459, or at least until he has done so. *Myers* v. *Brodbeck, supra; Hall* v. *Dean* (1816) 13 Johns. 105. In consequence of this a grantor is practically released from liability, if the eviction does not occur until after a conveyance by the grantee. Many courts have therefore held that this covenant runs with the land by implying an assignment of the chose in action. *Geiszler* v. *DeGraef* (1901) 166 N. Y. 339, or by construing the covenant as one of indemnity. *Richard* v. *Bent* (1871) 59 Ill. 38. The common law rule, *supra,* also worked hardship in that the statute of limitations may have barred the action before any substantial damages could have been recovered. *Chapman* v. *Kimball* (1878) 7 Neb. 399. The theory that the statute does not begin to run until the damages are ascertainable, 19 Am. & Eng. Enc. (2nd Ed.), p. 194, lacks authority. But the same result is reached by construing the covenant, as in the principal case, as a continuing obligation to indemnify. See *Richard* v. *Bent, supra; Myers* v. *Brodbeck, supra.*

REAL PROPERTY—PARTY WALLS—COVENANTS RUNNING WITH THE LAND.—The owners of adjoining lots covenanted that A. might build a party wall, and B. would pay one-half the cost thereof upon user; the agreement to bind heirs and assigns. *Held,* that B.'s successor in title, who used the wall, would be liable on the covenant to A.'s grantee. *Hoffman* v. *Dickson* (Wash. 1907) 92 Pac. 272. See NOTES, p. 121.

STATUTES—INDIANS—JURISDICTION OF STATE COURTS.—A Tuscarora Indian sued in a State court to recover possession of land in the Tuscarora reservation wrongfully seized by the defendant. Jurisdiction was invoked under § 5 of the Indian Law, providing that any demand or right of action, jurisdiction of which is not conferred upon a peacemakers' court, may be prosecuted and enforced in any court of the state. No peacemakers' court existed in that tribe. *Held,* one justice dissenting, the state courts would take jurisdiction. *Peters* v. *Tallchief* (1907) 106 N. Y. Supp. 64.

While refusing of their own initiative to take jurisdiction of the domestic affairs of the Indians, *Dole* v. *Irish* (1848) 2 Barb. 639; *Holland* v. *Pack* (Tenn. 1823) Peck 151, regarding the tribes as dependent nations capable of self-government, see *Worcester* v. *Georgia* (U. S. 1832) 6 Pet. 515, the courts have nevertheless recognized the right of the legislature to extend their jurisdiction, *Dole* v. *Irish, supra; Jimeson* v. *Pierce* (N. Y. 1902) 78 App. Div. 9,

especially when the tribe has become so weak as to be incapable of self-government. McLean, J., in *Worcester* v. *Georgia, supra.* The legislature of New York has extended over the Indians criminal laws, Laws of N. Y. 1822, ch. 204, marriage and divorce laws, Laws of N. Y. 1892, ch. 679, § 3, prescribed the form and duties of peacemakers' courts, ibid. § 47, provided for the enforcement of judgments of the latter in state courts, Laws of N. Y. 1893, ch. 229, § 53, the validity of which legislation has never been doubted. The statute in question, originally enacted for the Seneca Indians at the creation of the peacemakers' court, Laws of N. Y. 1847, ch. 365, § 14, in the revision of 1892 was made a general provision. It must be considered to have been intended to be of general application, Reviser's Note, 3 Rept. Comm. Stat. Rev. 2111, especially in view of the fast diminishing power of the New York tribes, and in accord with the legislature's policy of protection, thus opening the courts to all Indians and not confining the privilege to tribes where a peacemakers' court exists. As noted by the court, the statute does not deprive the Indians of the application of their customary law, nor does it violate any United States treaty rights. *People* v. *Pierce* (1896) 18 Misc. 83.

STATUTES—RAILROADS—REFUSAL OF TRANSFERS.—The plaintiff boarded a car with the sole object of bringing suit, if a transfer were refused him, under N. Y. Railroad Law, § 104, giving "any passenger desiring to make one continuous trip" the right to a transfer and providing that "for every refusal * * * the corporation so refusing shall forfeit fifty dollars to the aggrieved party." On the refusal of a transfer, a second fare was paid and the trip completed. *Held,* Gaynor and Woodward, JJ. dissenting, no recovery could be had. *Bull* v. *N. Y. City Ry. Co.* (1907) 106 N. Y. Supp. 378.

Where a plaintiff, after refusal, does not complete the trip contemplated, no recovery is allowed. *Myers* v. *Brooklyn etc. Co.* (1896) 10 App. Div. 335. Where the trip is, nevertheless, completed some difference of opinion has prevailed, *Topham* v. *Interurban etc. Co.* (1904) 42 Misc. 503, 505; *McLean* v. *Interurban etc. Co.* (1904) 87 N. Y. Supp. 135; *Fitzmartin* v. *N. Y. City Ry. Co.* (1906) 51 Misc. 36, although the weight of controlling authority now denies a recovery under the facts of the principal case. *Nicholson* v. *N. Y. City Ry. Co.* (1907) 118 App. Div. 858; *Kelly* v. *N. Y. City Ry. Co.* (1907) 119 App. Div. 223, 232; *Johnston* v. *N. Y. City Ry. Co.* (1907) 54 Misc. 642; *McCarthy* v. *N. Y. City Ry. Co.* (1907) 55 Misc. 208. On principle, this conclusion is sound. The statute points to a passenger desiring to make one continuous trip as the aggrieved party. Hence one whose intention is to collect the penalty using the trip as a mere means does not come within the statute. *Myers* v. *Brooklyn etc. Co., supra.* This should not, however, be confused with a case where the statutory object is present, and the collection of the penalty is only a motive. *Fitzmartin* v. *N. Y. City Ry. Co., supra.* Under like statutes, similar results have been reached in other Jurisdictions. *Southern Pacific Co.* v. *Robinson* (1901) 132 Cal. 408; *Jolley* v. *Chicago etc. Co.* (1903) 119 Ia. 491. The decision in *Fisher* v. *Railroad Co.* (1871) 46 N. Y. 644, is not contradictory to the principal case, as the section, N. Y. Railroad Law, sec. 39, there interpreted, gives the penalty to any party paying a fare. *Myers* v. *Brooklyn etc. Co., supra; Nicholson* v. *N. Y. City Ry. Co., supra.*

SURETYSHIP—SUBROGATION—RIGHT BEFORE PAYMENT.—The payee brought an action on three of five notes given in payment for land, asking that the land be sold to satisfy the claim. The assignee of the guarantor, who had taken up two of the notes, asked that the proceeds of the sale be applied to the notes held by him. *Held,* that the proceeds would not be applied to all the notes *pro tanto,* but would be applied to the notes taken up by the guarantor, subject to prior satisfaction of those in the hands of the payee. *McClure's Ex'r* v. *King* (Ky. 1907) 104 S. W. 711.

Although a guarantor has an equitable interest in the security for the debt, *Manning* v. *Ferguson* (1897) 103 Ia. 561; *Moore* v. *Topliff* (1883)

107 Ill. 241, he has no right to equitable subrogation *pro tanto* upon part payment, *London etc. Co.* v. *Fitzgerald* (1893) 55 Minn. 71; *Wilcox* v. *Fairhaven Bank* (Mass. 1863) 7 Allen 270, as no right to subrogation arises before full satisfaction of the debt. *Ames* v. *Huse* (1893) 55 Mo. App. 422; *Conwell* v. *McCowan* (1870) 53 Ill. 363. This is because the creditor would thereby be prejudiced, *London etc. Co.* v. *Fitzgerald, supra; Wilcox* v. *Fairhaven Bank, supra,* and where the circumstances are such that he would not be prejudiced, subrogation has been decreed before satisfaction of the debt. *State* v. *Atkins* (1890) 53 Ark. 303. Thus, it may be decreed conditionally upon such satisfaction. *Moore* v. *Topliff, supra; City of Keokuk* v. *Love* (1871) 31 Ia. 119. This result was reached in the principal case.

TORTS—ANIMALS FERAE NATURAE—GAME LAWS.—The defendant killed the plaintiff's dog in order to save a wild deer upon his land during the closed season. *Held,* he was liable for the value of the dog. *Zanotti* v. *Bolles* (Vt. 1907) 67 Atl. 818.

At common law dogs were recognized as property for the purposes of civil, *Wright* v. *Ramscot* (1667) 1 Saund. 84; see, *Warren* v. *State* (Ia. 1848) 1 Green 106, 111, but not for criminal actions. *Case of Swans* (1593) 7 Coke 18 a; *Reg.* v. *Robinson* (1859) 8 Cox C. C. 115. In the United States dogs are generally regarded as property, *State* v. *M'Duffie* (1857) 34 N. H. 523; *Kinsman* v. *State* (1881) 77 Ind. 132, irrespective of their value, *Parker* v. *Mise* (1855) 27 Ala. 480; *Dodson* v. *Mock* (N. C. 1838) 4 Dev. & Batt. 146, and may not be destroyed merely because they are trespassing, *Fenton* v. *Bisel* (1889) 80 Mo. App. 135; *Brent* v. *Kimball* (1871) 60 Ill. 211, but may be killed to prevent destruction of property. *King* v. *Kline* (1847) 6 Pa. St. 318; *Brauer* v. *English* (1886) 21 Mo. App. 490. Animals *ferae naturae* belong to the state, with a qualified right for citizens to obtain property in them, *Geer* v. *Connecticut* (1896) 161 U. S. 519, and therefore it is proper for the state, under its game laws, to prescribe periods within which they may not be killed, *Ex parte Maier* (1894) 103 Cal. 476; *Magner* v. *The People* (1881) 97 Ill. 320; *State* v. *Rodman* (1894) 58 Minn. 393, but this would not necessarily prevent property being acquired by individuals since property may be acquired in other ways than by killing. *Haywood* v. *State* (1883) 41 Ark. 479; *Ulery* v. *Jones* (1876) 81 Ill. 403. In the principal case it did not appear that the deer had been reduced to captivity and as no right to acquire property by killing existed, it would seem that the defendant had no property interest to protect which could justify him in killing the dog. See *Chapman* v. *Decrow* (1899) 93 Me. 378, 388.

TORTS—PUBLIC SERVICE CORPORATIONS—DUTY OF RESPECTFUL TREATMENT.—The plaintiff, as agent for another, presented a telegram to the defendant's operator for transmission, but the latter swore at him heavily, and ordered him to leave the office. This action is brought to recover damages for mental suffering. *Held,* the plaintiff could recover. *Dunn* v. *W. U. Tel. Co.* (Ga. 1907) 59 S. E. 189.

Ordinarily, no action lies for malicious insults; *Broderick* v. *James* (N. Y. 1871) 3 Daly 481; but a duty of respectful treatment has been placed on carriers, *Chamberlain* v. *Chamberlain* (1823) 3 Mason 242, and, perhaps, on innkeepers. Cf. 7 COLUMBIA LAW REVIEW 553. Its extension to all public service corporations seems unjustifiable, as the departure from the general rule in the exceptions above noted is due to the necessity of preventing an abuse of the semi-police power possessed by carrier and innkeeper over passenger and guest. In the cases relied on by the court, *Gasway* v. *Ry. Co.* (1876) 58 Ga. 216; *Ry. Co.* v. *Richmond* (1893) 98 Ga. 495, the insults merely went to increase damages for an assault committed by the carrier; while in the principal case the plaintiff had no interest even in the message the transmission of which was refused.

TORTS—REPLEVIN—CONVERSION BY PLAINTIFF AS A DEFENSE.—The defendant's cash register was delivered to the plaintiff by the former's bailee in

return for one belonging to the plaintiff. The defendant assumed possession of the plaintiff's register. The plaintiff brought replevin. *Held*, he could not recover until he returned the defendant's register. *Freeman* v. *Trummer* (Ore. 1907) 91 Pac. 1077.

The solution of the principal case depends upon the nature of the agreement. If title or any transferable interest in the plaintiff's register vested in the defendant's bailee, or if the latter acted as an unauthorized agent whose act was not ratified, a nonsuit should have followed. *Chambers* v. *Hunt* (N. J. 1841) 3 Har. 339, 343. But if the plaintiff retained title, giving up merely a non-transferable possession; or if the bailee's act as unauthorized agent was not ratified; see *Herd* v. *Bank* (1896) 66 Mo. App. 643; or if the act was a wilful appropriation; then there were separate conversions by the defendant and by the plaintiff. *Galvin* v. *Bacon* (1833) 11 Me. 28; *Breckenridge* v. *McAfee* (1876) 54 Ind. 141. The attitude of the principal case, that the one conversion might defeat a recovery for the other, is unsound, *Blair* v. *Johnson* (1903) 111 Tenn. 111; *Williams* v. *Irby* (1881) 15 S. C. 458; *Moffatt* v. *Van Doren* (N. Y. 1859) 4 Bos. 609, since the fact that the plaintiff had some of the defendant's property tortiously in his possession did not affect the right to the immediate possession of the property described in the complaint. *Lovensohn* v. *Ward* (1872) 45 Cal. 8.

TRUSTS—POWER OF TRUSTEE TO LEASE—REASONABLE TERM.—A deed to trustees in fee, to hold in trust during the lives of the cestuis, gave the trustees power to lease property (unimproved city lots) and power to manage and control it as should seem advisable to them. After the trust period, they were to convey the property to remaindermen in fee. As the only method of securing a reasonable rental, the trustees had made a lease for ninety-nine years, the tenant to build on the land demised. *Held*, the lease would not be sanctioned. *In re Hubbell Trust* (Iowa 1907) 113 N. W. 512. See NOTES, p. 129.

WATERS AND WATERCOURSES—FRANCHISE—RIGHT TO SELL WATER IN MAINS.—The defendant company had run its water mains through the City of Rochester under a franchise to supply suburban towns. *Held*, the defendant's property in the water gave it no right to sell to consumers in Rochester, though sold on their own property in the city. *City of Rochester* v. *Rochester & Lake Ontario Water Co.* (N. Y. 1907) 82 N. E. 154.

This case presents an interesting application of a settled principle which deprives the owner of control over his own property while exercising an easement over another's. Water, although real property in the stream, is personalty when appropriated therefrom. *Heyneman* v. *Blake* (1862) 19 Cal. 579. As its property the company could have sold the water, but it was within the City as property by virtue of a franchise, under which nothing passes by implication, *Charles River Bridge* v. *Warren Bridge* (1837) 11 Pet. 420, 425, and which must be construed strictly against the grantee. *Wabash Ry. Co.* v. *Defiance* (1895) 52 Oh. St. 262, 307. The franchise granted an easement through the City's streets solely for the purpose of transporting the water to other municipalities, and, therefore, selling the water was a misuse of the easement which could be enjoined. Cf. *Howell* v. *King* (1674) 1 Mod. 190; *French* v. *Marstin* (1855) 32 N. H. 316.

WILLS—INTESTACY—ESTATE BY IMPLICATION.—A testator left his residuary estate to A. and B. in fee, but if either should die without issue surviving, her share to go to the survivor. A. died before the testator, leaving issue. *Held*, there was an intestacy as to A.'s share. *Matter of Disney* (1907) 38 N. Y. Law Jour. No. 62.

As A. left issue surviving, B. cannot take her share. And the intestacy rejects necessarily the only remaining legatee, namely, the issue of A., who might take by implication. An implication must not be merely conjectural or probable; *Moone* v. *Heaseman* (1738) Willes 138, 141; it need not be absolutely irresistible, but in some sense unavoidable, as where all circumstances afford an undoubted inference. *Bootle* v. *Blendell* (1815) 19 Ves.

Jr. 494. Where, as in the principal case, the issue is named only in describing the contingency, an intent to give to the issue is not shown, *Ranelegh* v. *Ranelegh* (1849) 12 Beav. 200; *Neighbour* v. *Thurlow* (1860) 28 Beav. 33, whether the parent have an absolute interest, *Cooper* v. *Pitcher* (1845) 4 Hare 485, or only a life interest, *Scalé* v. *Rawlins* [1892] App. Cas. 342, and though it be a residue. *Addison* v. *Busk* (1851) 14 Beav. 459. Where the parent has the absolute, and not a mere life, interest, there is less reason to infer a gift to the issue. 2 Jarman on Wills, 5th Am. Ed., 139. This is hardly true where the legatee in fee has died before the testator, leaving issue; he cannot make provision for them. In case only a life interest is bequeathed, however, the court will imply from slight additional circumstances a gift to the issue. *Kinsella* v. *Caffrey* (1860) 11 Ir. Ch. Rep. 154. The principal case accords with the weight of authority. *Contra, Bentley* v. *Kaufman* (Pa. 1877) 12 Phila. 435.

BOOK REVIEWS.

CHARLES S. BULKLEY, *Editor-in-Charge.*

AMERICAN LEGISLATURES AND LEGISLATIVE METHODS. By PAUL S. REINSCH. New York: The Century Co. 1907. pp. x, 337.

Professor Reinsch has written an interesting book on what might seem to be an unpromising subject. American Legislatures, both national and state, have long furnished color to journalistic painters of American political life, but it cannot be said on the whole that the color has been pleasing or that the picture has made the decent American citizen over proud. American legislative methods, simply considered as means to an end, make pretty dry reading for the average man. Nevertheless Professor Reinsch has made an interesting book. He has treated the politicians with a seriousness that they cannot usually expect, and sometimes it almost seems from the author's discussion that our legislators are working on a serious and a more or less consistent plan.

The chapter on the House of Representatives is especially interesting. In the first place, it ought to be said that the description of the methods practised before Speaker Reed loomed large upon the scene, and the account of the changes which were worked out by that unique personality, and as a consequence of his own achievements, is accurate and clear. One may learn from the book the old practices and their evil consequences, and may follow the stages of the development of the rules and practices to the present day. What is perhaps not so clear from this conscientious study is the character of the American legislator, and yet therein lies the germ of the American, or, indeed, any other, legislative system. Professor Reinsch does not neglect the human element of the problem, but the dominance of the power of conditions has its accustomed place. It makes a great difference whether a political problem is regarded from the point of view of German philosophy or of English practice and experience.

The problem, however, is clearly presented. We possessed an impossible House of Representatives. Little could be accomplished. We are now considering, of course, the normal years that succeeded the abnormal years of the war, and of reconstruction, when there were two parties alternating with each other in the control of the House. Serious business could not be transacted partly because the methods of the House lent themselves to the aid of obstruction, and partly because the Representatives were unwilling, or unable, to attend to serious business. In this respect there has been no change. Since the war of secession the House has not initiated and passed, aside from the annual money bills, a single serious measure for the general welfare after intelligent consideration. Tariff bills have been enacted, always at the bidding of special interests. Coinage and currency laws have been placed upon the statute book, but they have been supported or opposed for other reasons than those which ought to determine the action of a law-making body. A railroad rate law has been rushed through the House at the dictation of leaders, under whip and spur, and

without debate. Before Speaker Reed, however, revolutionized the procedure of the House, even party measures fared badly. The old rules gave the minority almost complete control of legislation. This would be bad whatever the character of the body; it was especially bad in such a body as the House of Representatives.

With few exceptions the members of that House cannot be called national legislators, nor are many of them concerned with questions relating to the general welfare. They are governed and guided by the desire to get into the House, and to remain there or to go higher. To accomplish this object they must be loyal, that is obedient, to the party organizations of their several states and localities. The state organization often means one of the Senators from a member's state. As it is the business of the Representative to preserve for himself the favor of the organization and its leader, so it is the business of the organization to keep in good humor the "boys" who work the machine. The most effective way to do this is to keep the "boys" in jobs, to fatten them on rich contracts, while it is also well constantly to "do something for the district," to build new court houses and post offices, to improve its waterways, etc.

All this is an old story, but we cannot understand legislative methods without understanding the kind of men who devise them and the reason, or the philosophy, if it may be so dignified, for choosing these particular methods. Little, as has been said, could be accomplished under the old rules because the minority controlled. Finally and properly the majority determined that the reign of the minority should cease, and that the power of the majority should be established. The majority had been prevented from passing its party measures, while personal measures could not be passed by log-rolling which was frequently expensive. From the "pork barrel" members have taken much spoil for their districts and themselves, but in the taking, the minority has been able to demand a share sometimes disproportioned to its numerical merits. But a better system was needed, whether the work to be done was for the nation or for the party.

Professor Reinsch has most luminously pointed out the way in which the needed change was effected. Power was concentrated. What has been called "the hierarchy" was established. In a word, the Speaker was made the House of Representatives. There may be made against him, it is true, successful revolts, but, in general, it may be said that, under the present rules, the Speaker is the House. It is needless to point out the steps that were taken to reach this result. Professor Reinsch, as has been said, has admirably performed that task. The Committee on Rules, of which the Speaker is a member, determines what legislation shall pass the House, and by its power to prevent, or to guide amendments, its control is so complete that it gives to every measure the character it desires. Naturally, as Professor Reinsch suggests, this Committee is not necessarily composed of the ablest men of the House. It is not possible that it should be. It is composed of men who, in one way or another, have been able to remain in the House for a number of years, and, necessarily, of men who are willingly obedient to the Speaker.

This concentration of power is, to a certain degree, essential if the House is to transact business, but, like other power in the hands of American politicians, it is abused. It was such an abuse, for instance, when, in 1897,

Speaker Reed refused to appoint the Committees of the House until he had secured the passage of the bill he favored, and had prevented votes on measures of which he did not approve. There was never, before or since, so flagrant an employment of committee chairmanships, or places, as bribes for votes. Much of the power of this Committee on Rules has been acquired by "construction," but let us speak of it as development. Government as an art must develop to meet changing conditions. There has been nothing sinister, and nothing that is really evil in this growth. The danger is that the House will assume that the end has been attained by the establishment of the power of the Speaker and his associates, whereas this is only a stage in what should be the progression. There ought to be established as soon as may be the accompanying responsibility. In some way, the methods of the House should not permit its rulers to remain in power after such defeats as have been suffered by Speaker Henderson and Speaker Cannon and their Committees on Rules.

Professor Reinsch points out that the paramount influence upon legislation is the President's or the Speaker's will, depending on the strength of the personality of the one or the other; but after all, it is the Speaker who possesses the dominant authority. If Congress were scientifically constituted, the constructive tasks of the most important legislation should be in the hands of recognized men who also possess administrative power. However, we are endeavoring, contrary to all previous and to all other contemporaneous legislative methods, to leave legislation entirely in the hands of those who have no practical experience with the administration of laws, and we must deal with the situation as we find it. The House of Representatives is now endeavoring to sustain an organization that will enable it to work. In doing this the old anarchy has been cured. The House can no longer be compelled to stand still by the minority. It no longer feels the destructive influence of the irremediable conflicts resulting from antagonistic desires and greeds and ambitions; but the old evil has not yet been cured; it is only in the process of being cured.

The Speaker's desire for legislation, aside from that included in the appropriation bills, is naturally confined to the measures which are, in his opinion, for the good of the party. Above all other members of the House, he is intensely concerned to maintain his party's majority. The legislation in which he is interested is legislation which will procure votes for his party, that especially which will carry the majority of the districts, thereby keeping in his hands the great power that every ambitious man loves. The Speaker will act with the President, will even be influenced by a strong President, until he becomes convinced that the President's policy is likely to decrease the party's majority in the House. The President, however, must be of the Speaker's own party, and this is significant. During most of the few normal political years that we have had since 1873, the Speaker has been a Democrat and the President a Republican. So, for different reasons, the Speaker is the dominant authority in legislation, and he looks upon legislation from the point of view of the party and especially from his own point of view. The House, in other words, is just as much influenced by the peculiar character of the American legislator as it was when the rules encouraged anarchy.

Here we find the reason why the development which was started by Speaker Reed does not proceed. Power has passed from the House to its leader and a select body of its members, and there the movement has stopped. If it remains as it is, the House must continue to deteriorate. Professor Reinsch points out some of the evils that have already resulted. The members are so domineered over that the House has lost its self-respect; it becomes more and more dependent on the Senate, and often this dependence is servile; its right of debate has gone, and while, on rare occasions when excitement carries it away from the control to which it generally submits, its power to debate seems to have departed with the right; its ablest men are kept out of place and power, for it is the nature of such an oligarchy as that which now rules the body to be jealous of ability; indeed, an able and independent man, unless his interests depend upon his self-effacement, could not submit to such a rule as that which now is well nigh despotic over the House of Representatives. Revolting members, unless they are unusually strong men, are denied their proper position in the House and they are also prevented from rendering useful services to their constituents or to the country; their bills will not be considered, and they are denied the right of debate, when debate takes place.

These are unquestioned evils of the House of Representatives, and they result not from the rules themselves, but from their maladministration, from the abuse of the power which the Speaker and his friends have taken to themselves. No machinery of procedure can cure such a defect. The country can only hope that some day it will itself acquire sufficient virtue to send to the House men who will complete the development of procedure so that those who have power shall also have responsibility, and so, also, that there shall be debate, in a word so that a civilized form of government, of law making especially, shall be established for a civilized people.

The book contains much that is interesting, and some things that are confusing, about the Senate and the State Legislatures. Professor Reinsch seems to be of the impression that the time is coming when the partnership between the government and the great corporations shall be more complete than it is; when, in other words, it will become more profitable for corporations to corrupt government. Into that part of the book I shall not follow him beyond expressing the hope that he is mistaken and that the movement for "co-ordination," as he euphemistically expresses, or conceals, his meaning, will not destroy the democracy until it has been demonstrated beyond peradventure to be unable to work out its problems.

THE LAW OF TORTS. By MELVILLE MADISON BIGELOW. Eighth Edition. Boston: Little, Brown & Co. 1907. pp. xxxv, 502.

In 1878, some three years after the appearance of Mr. Bigelow's "Leading Cases on the Law of Torts," he put forth a small handbook entitled "Elements of the Law of Torts, for the use of Students." This was at once well received as a valuable contribution to the rapidly increasing literature upon this subject. Since then seven successive editions have appeared; the eighth having just been published. In this process of evolution the students' handbook, with its practical exercises, has become a compact, concise treatise now covering every branch of the law of Torts.

Throughout this period from first edition to last, the author has shown himself a diligent, philosophical and progressive student—or rather master—of the law. In these several editions he has not hesitated to discard former theories, as further reflection has convinced him that they were untenable, or to show himself responsive to the changes which modern decisions, under social pressure, have made and are making in the law. The case of *Allen* v. *Flood* (1898) A. C. 1, vitally important as it was then deemed to be, led him, as it did Sir Frederick Pollock, to produce a new edition, adjusting, so far as might be, his views and statements of the law to the supposed innovations brought about by that case.

The limitation of that case (which was generally supposed to legitimate the boycott) by *Quinn* v. *Leatham* (1901) A. C. 495, and the decision of numerous great and important cases, both in England and in this country, involving questions in the struggles of capital and labor, have been the main reason for this edition. Perhaps it would be better to let the author state his position in his own words, taken from the preface:

> "A new point of view has made its appearance out of the agitation of social movements, within the last half dozen years since the last edition of this book was in hand. * * * The decisions of the past are not being overruled, in the proper sense; they have their place in the movement and are simply left in due course; they are not wrong—they are past. This, it is apprehended, is or should be the way of all precedent.
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> "The new point of view, which is that law must be regarded as the resultant of conflicting social forces (less the conservatism of courts and legislatures)—a point of view long hidden from sight in the faint stages of a social era of equality—is reflected on many pages of this book as it now appears."

The very many, and often conflicting and confusing, decisions on the questions arising out of labor disputes, are admirably discussed and distributed in the two chapters on "Procuring Refusal to Contract" and "Procuring Breach of Contract." How nearly to date he has brought this discussion is shown by his references to *Beekman* v. *Marsters,* 80 N. E. Rep., 817; *Brennan* v. *United Hatters of N. A.* (N. J.), 65 Atl. Rep., 165; and *Booth* v. *Burgess,* id. 226; the latter—in the writer's opinion—being a very important and illuminating decision.

But this is not all. The author has taken advantage of this opportunity to revise, in some degree, his theory and doctrine of tort, and to present a new classification, depending upon whether the tort feasor is of culpable or inculpable mind. Under the first head he includes acts or omissions where the defendant's liability depends upon his special mental attitude, including deceits, negligence, and those cases where malice, as an entity or as an inference, is an essential element of liability. All other torts are put into the second class, where the state of mind is deemed to be an irrelevant fact.

The book in all its parts is strengthened by the addition of new matter and the citation of recent authorities. It contains sixty-two more pages than its predecessor, but this is by no means indicative of the importance of the new matter.

A characteristic feature of the work in its several editions is the "Statement of Duty," which precedes the consideration of each specific tort. The value of this cannot be denied, though it has been criticised.

A discussion of the law of torts from the standpoint of defendant's duty is certainly helpful, though as suggested by Stevenson, V. C., in the New Jersey case last cited, it is sometimes even more helpful to start from the standpoint of the right claimed by the plaintiff.

Possibly a future edition, in which a statement of the duty should be followed by an equally concise statement of the right infringed, might be even more useful.

The book is rather strong food for the student, but it is of great value both to him and to the practitioner.

THE LAW OF PRIVATE PROPERTY IN WAR, WITH A CHAPTER ON CONQUEST. By NORMAN BENTWICH. London: Sweet & Maxwell, Ltd. 1907. pp. xii, 151.

Reasoning from the principle that philosophy lags always behind the facts, perhaps one strong indication that world thought is well nigh ready to endorse world peace, is the recent multiplication of treatises upon the amelioration of the laws of war. Among such books, the Yorke Prize Essay for 1906, by Mr. Norman Bentwich, is an interesting contribution.

Mr. Bentwich frankly avows that his volume is largely but a compilation from Westlake, Hall, Wheaton, Oppenheim, Snow and Tudor. Its merit is that it presents, compactly and clearly, one subject, the law of private property in war. Sufficient of history is given and enough cases are cited to free the discussion from any charge of being merely theoretical. At the same time, the argument is not made heavy and prolix by parade of learning. In case citation, Mr. Bentwich makes much use of American decisions, recognizing that from the beginning the American Courts have freely accepted and enforced the law of nations.

This essay is especially concerned with present usages and tendencies. It deals exclusively with the law affecting private persons and aims to cover the effects of war, in all of its relations to private property, of enemies, as well as of neutrals, and both on land and on sea. While it thus points out the usages as they exist, it also braves criticism by declaring particular practices to be obsolete, and it even suggests steps of reform where it has argued that present practice violates the underlying principles of modern usage.

Among reforms advocated are the abolition of prize money, the adoption by English and by American courts of the French principle as to enemy domicil, and of the French rule requiring actual notification of a blockade, compensation to neutral owners for innocent cargo destroyed on an unarmed vessel of the enemy, the exemption of mail steamers from capture, the classification of contraband of war by an international commission, and even the limitation of the area over which the belligerents may exercise the rights of visitation and search. (Pages 96, 97, 133, 134, 137, 138.) These modifications are suggested in the belief that they, if adopted, will make sea war as humane respecting the capture of private property, as is war upon land.

It is an interesting illustration of national limitations that the same writer who advocates so many important and far-reaching improvements is opposed to the proposition that all private property of the belligerents, at sea, should

be immune, provided only that it be not contraband. Were Mr. Bentwich an American writer he would doubtless endorse this most important next step, which the United States has favored throughout her history. Being an English author, under the influence of British tradition and teaching, he argues rather elaborately, considering his usual meritorious brevity, to the conclusion that "as a general rule, both from a moral and from a practical standpoint, England is justified in adhering to the present rule," *i. e.*, confiscation of enemy's property on the sea, regardless of its peaceful character (Chap. vii.).

Perhaps the most suggestive chapter in the book is that upon "Conquest and Private Property" (Chap. vi.), wherein the responsibility of the conqueror to property owners and to creditors of the conquered territory is ably discussed in the light of many modern instances.

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COLUMBIA LAW REVIEW

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THE METHODS AND CONDITIONS OF LEGISLATION IN OUR TIME.[1]

The immense increase in the volume of legislation during the last half century is one of the salient features of our time. Various causes may be assigned for it. It may be due to the swift changes in economic and social conditions which have called forth new laws to deal with these new facts. Pessimists may ascribe it to the spread of new evils or the increase of old evils which the State is attempting by one expedient after another to repress. This is what Tacitus meant when he wrote, *"Corruptissima republica plurimæ leges."* Or the optimist may tell us that it is an evidence of that reforming zeal which is resolved to use the power of the State and the law for extirpating ancient faults and making every one happier. Which of these or of other possible explanations is the true one, I will not stop to consider. But the fact that the output of legislation has of late been incomparably greater than in any previous age—greater not only absolutely but in proportion to the population of the civilized nations—suggests a consideration of the forms and methods of law-making as a topic well suited to be dealt with by a great professional body such as I have the honor of addressing. Lawyers and Judges have to know the law, to explain the law, and to apply the law. It is of the utmost consequence that their influence should be exerted to see that the law is well made.

Here, in particular, this subject has an urgent claim upon your attention, for although there is more legislation everywhere in Western Europe than there used to be, and far more in England, still in no country is the output so large as in the United States, where, besides Congress, forty-six State Legislatures are busily at work turning out laws on all imaginable subjects with a faith

[1] An address delivered before the New York State Bar Association, January 24, 1908.

in the power of law to bless mankind which few historians or philosophers, and few experienced lawyers, will be found to share.

In modern free countries where laws are enacted by representative assemblies, where the economic and social questions to be dealt with are generally similar, and where the masses of the people are moved, broadly speaking, by the same impulses, the problem of how to make legislation satisfactory in substance and in form is virtually the same problem everywhere. Accordingly, the light which the experience of one country affords is pretty sure to be useful to other countries. In the general observations I propose to offer to you, you will probably wish that I should dwell upon that experience, and should in particular indicate which of the experiments tried in England have proved successful, and what are the problems that remain for that country still unsolved.

First, let a word be said on the authorities whence legislation in England proceeds. A supreme legislature has many diverse kinds of rules to make; and the growth of business in the British Parliament has led to the severance from general public statutes of other kinds of work with which Parliament formerly dealt much as it deals with those statutes now.

At one time Parliament used to pass acts which, being of temporary application, and passed for special reasons, ought hardly to be deemed legislation in the proper sense, being really rather in the nature of executive orders. To-day it very rarely passes such acts. Orders of the executive kind are now made not directly by Parliament, but either by the King in Council, upon some few matters that are still left within the ancient prerogative of the Crown, or else under statutory powers entrusted by Parliament either to the King in Council or to some administrative department. I believe that in France and Germany also such orders are not made by the legislature. There is also a larger class of rules or ordinances of a somewhat wider but not general application, which being of an administrative nature require from time to time to be varied. Such rules or ordinances are in England now usually made by authorities to whom power in that behalf has been specifically delegated by Parliament. We have now a mass of such "Statutory Rules and Orders" as we call them, filling many volumes. Some, including those which affect the Crown colonies, are made by the Crown in Council. Some, being those which regulate legal procedure in the Courts, are made by the Rule Committee, consisting of Judges of the Supreme Court of Judicature,

and other representatives of the legal profession. The rest are made by the Departments of State, especially by the Home Office and the Local Government Board.

A third class includes enactments which, though they apply only to particular places or persons and are thus not parts of the general law, such as railway acts, canal, gas and water, and electric lighting acts, acts giving powers to municipalities or other local authorities, etc., are passed by Parliament and have the full legal effect of a general statute. They are, however, sharply distinguished from general public acts in the method by which they are passed. They are brought in on a petition by private persons. Notices have to be publicly given of them some two months before the usual beginning of a Parliamentary session in order to call the attention of all persons possibly interested. When brought in they are, after the second reading (which is taken as a matter of course, unless some special cause of opposition on general public grounds is alleged), referred to a small committee, usually of four members, before which the opponents may appear to resist them or to have them modified. The members of this committee make a declaration that they have no private interest in the matter dealt with by the bill, and are required to deal with it in a judicial spirit, on the basis of the evidence presented and the arguments used by the lawyers who represent each side, just as in a Court of Justice. It is deemed improper to attempt to address private solicitations to the members of the committee to influence their decision. Under this system all our railways, and such other public undertakings as require statutory sanction, have been constructed and have had their legal power from time to time increased or varied. It has worked well in every respect but one. It has been costly, for where the bill has been contested the fees paid to agents and counsel sometimes mount up to huge sums. But it has been administered not only with honestly but with seldom even a suspicion; and it has relieved the two Houses of a vast mass of troublesome work by leaving this work to judicial committees. Moreover, it has the advantage of giving every such bill the certainty of being examined on its merits. Being outside the competition for time of public bills, and treated in a different way, the pressure of public business does not prevent a private bill (except in the rare cases where a large public issue is raised) from being sent to a committee, considered there, and, if it pass the committee, being reported to the House and passed there. The

committee may reject a bill, but cannot get rid of it quietly by omitting to report. Finally, it relieves members of Parliament of having to spend time and toil in advocating or opposing bills affecting their constituencies. Having, during twenty-seven years in the House of Commons, represented two great industrial communities, I can bear witness to the enormous gain to a member in being free from local interests and local pressure.

I dwell upon this point in order to explain to you how it is the British Parliament has been able to deal with the great mass of local legislation necessarily imposed on it by the principle that special statutory authority is required for undertakings which involve the compulsory taking of land or the creation of what is in itself a monopoly. Other details regarding these private bills must be left unnoticed, that I may pass on to the larger question of public general legislation, which is what most interests you and me as lawyers.

The quality of statute law may be considered in respect: First, of its Form; secondly, of its Substance.

As respects Form, you, as lawyers, know that a statute ought to be clear, concise, consistent. Its meaning should be evident, should be expressed in the fewest possible words, should contain nothing in which one clause contradicts another or which is repugnant to any other provision of the statute law, except such provisions as it is expressly intended to repeal.

To secure these merits two things are needed, viz.: That a bill as introduced should be skilfully drafted, and that pains should be taken to see that all amendments made are also properly drafted, and that the working is carefully devised at the last stage and before the bill is enacted. Of these objects the former is in England pretty well secured by the modern practice of having all government bills—these being the most important and the large majority of those that pass—prepared by the official draftsman, called the Parliamentary Counsel to the Treasury. If the form is not always satisfactory, that is due not to his fault but to parliamentary considerations, viz., the need for putting measures into shape which makes it least difficult to run them through Parliament. As respects amendments in committee and final revision, our English procedure is not satisfactory. There ought to be some means of correcting, before a measure finally passes, those inelegancies, redundancies and ambiguities which the process of amending in committee usually causes. But as Parliament has, so far,

refused to allow any authority outside itself to alter the wording in the smallest point of form, all that can be done is to use the last stage of the bill to cure such blemishes as can be discovered. Doubtless the same difficulties arise here. I am not fully informed as to how they are dealt with, but have learnt with great interest of the efforts recently made in Wisconsin, under the zealous initiative of Mr. McCarthy, and in this State, also, to supply by a bureau of legislation assistance to members of the legislature in the preparation of their bills. The value of this seems to have been already recognized in both States, and I hear that there are now seven States in all where arrangements are made by State authority for such help.

Now let us come to the Substance of legislation, and start from two propositions which every one will admit.

1. There is in all free countries a great demand for legislation on all sorts of subjects, mainly due to the changes in economic conditions and to the impatience of reformers to have all sorts of evils dealt with by law.

2. The difficulty of framing good laws is enormous, because the work is in most countries no longer the comparatively easy task of repealing old laws which hampered and constrained the citizens—destruction is simple work—but the far harder task of creating a new set of laws which shall guide and help men to attaining the ends they are bent on. Seventy years ago people thought that the great thing was to get freedom. When they had got it they were dissatisfied, and instead of simply letting everything and everybody alone to work out their own weal or woe, on individualist principles, they forthwith set to work to forbid some things which had been tolerated before and to throw upon government all sorts of new functions more difficult and delicate than those of which they had stripped it.

Whether the disposition to increase the range of governmental action is right or wrong, I am not here to discuss. The current is, at least for the moment, irresistible, as appears from the fact that it prevails alike in Western Europe, in England, in the British colonies and in the United States. The demand for a profusion of legislation is inevitable; and the difficulty of having it good, undeniable. In what does the difficulty consist?

In three things. First, of those who demand legislation, many do not understand exactly what is the evil they desire to cure, the good they seek to attain. Secondly, when they do understand

the evil they seldom know what is the proper remedy, when they seek the laudable end they seldom perceive the best means to it. Thirdly, the number of measures, remedial and constructive, called for is so large that it is very hard to select out of them those most urgently needed. No legislature can deal with all at once. Where many are being pressed at once by different persons they jostle one another, and like people crushing one another in the narrow exits of a theatre, they move more slowly than if they were passed in some regular order.

It would be easy to suggest, if one were drawing a new constitution for a new community, an ideal method of securing good legislation and securing it promptly. But we have actual concrete constitutions and governments to deal with, so instead of sketching ideals, I will ask you to consider the actual machinery provided in the United States and in Britain for passing statutes. This machinery differs materially in the two countries.

The American plan starts from the principle that the legislative department must be kept apart from the executive. Accordingly, the administration in the National and in the State governments has neither the responsbility for preparing and proposing measures nor any legally provided means at its disposal for carrying them through Congress, though the President and the State Governors can recommend them, and sometimes succeed in so using their influence as to secure a bill's passing. You rely on the zeal and wisdom of the members of Congress to think out, devise and prepare such measures as the country needs; on the committees of your assemblies to revise and amend these measures; on the general sense of the assemblies and the judgment of their presiding officers or of a so-called "steering committee" to advance and pass those of most consequence.

We, in England, have been led by degrees to an opposite principle. The executive is with us primarily responsible for legislation and, to use a colloquial expression, "runs the whole show," the selection of topics, the preparation of bills, their piloting, and their passage through Parliament.

It is a frequent practice for the government to appoint commissions to take evidence and report upon topics of importance which need legislation. Such reports are often valuable, and often lead to the passing of good measures. They would be still more valuable but for the political pressure which usually compels a government, against its better judgment, to make commissions

too large, and to place upon them persons better known as representatives of particular types of opinion than as experienced and impartial masters of the subject.

When it comes to the actual introduction of a measure, the work of preparation is done by an administrative department of the government and the drafting by the government draftsman. The department supplies the matter of the bill, the latter puts it into shape. Thus both a considerable measure of practical knowledge of the subject and a high measure of professional competence for giving legal form to what is meant to be enacted are secured. Not only measures which raise large political issues, but all the more important measures of each session are brought in by the Ministry on their responsibility as leaders of the majority in the House of Commons. The most important, including those likely to raise party controversy, are considered by the Cabinet, sometimes also by a Cabinet committee, and sometimes at great length.

Bills brought in by private members are drafted by themselves, or by some lawyer whom they employ for the purpose. Should a private member ask a Minister or a department for assistance, it would always be given him, assuming that the department approved of its purpose. Nowadays, however, a private member's bill has no chance of passing, if opposed; so that legislation likely to raise any controversy has virtually passed into the hands of the Ministry.

Once the bill is launched its fate depends on the amount of intelligent care the Legislature is disposed to give it and the amount of skill the Minister in charge shows in steering the boat which carries its fortunes. He has, of course, the assistance of the official draftsman and sometimes of one or more colleagues in preparing his own amendments and considering those proposed by others. He must try to get time enough reserved for its passage, the disposal of time resting with the government.

The practical result of our English system may be summed up by saying that it secures four things:

(1.) A careful study of the subject before a bill is introduced.

(2.) A decision by men of long political experience as to which out of many subjects most need to be dealt with by legislation.

(3.) A careful preparation of measures, putting them into the form in which they are most likely to pass. Obviously that may not be always the best form, but there is no use in offering to

Parliament something too good for such a world as the world of practical politics everywhere is.

(4.) The fixing upon some one of responsibility for dealing with every really urgent question. Whenever an evil has to be dealt with or a want supplied by the action of the Legislature, there is never any doubt who shall do it. The government has got not only to propose something but to put something through, the Minister to whom it belongs having it in charge through all its stages. A government which fails to pass its bills suffers in credit; and if the matter is a specially grave one, may probably be turned out either by the House of Commons or by the voters at the next general election.

There are, however, defects in the English system. One is the fact that Parliament, in spite of all that has been done to relieve it, is still terribly overtaxed. There is more to be done than time can be found for. Another is the tendency to devote attention to measures not so much in the order of their real importance as of the amount of interest which the party in power feels in certain questions, an interest which may be comparatively transitory. A third is the disposition of an opposition in Parliament to oppose the measures of the government because it is the government that brings them forward. The habits of party controversy are so strong that the merits of a proposal are apt to be forgotten under the impulse of a desire to use all the means which the rules of debate provide for damaging or turning out a government whose general principles or actual conduct of affairs the minority may disapprove. This is the counte art of the advantage which the government power of pushing forward legislation carries with it, being indeed a defect necessarily incident to that advantage. It frequently involves much needless expenditure of time, and the loss of measures in themselves desirable. Thus it happens that in England, Ministers usually get less credit than they deserve for good measures lying outside the sphere of party controversy, and the needed legislation is always in arrear. Still, whenever the people feel that something is to be done, they know whom to require to get it done, and it gets done.

In France the method of legislation stands half-way between the American and the English methods. The Ministry studies a subject, often with great care, prepares a bill dealing with it, and launches the bill in the Chamber. There, the bill passes into the hands of a committee which amends and perhaps quite remolds

it, then returning it to the Chamber with an elaborate report. In the Chamber it is in charge, not of the Minister who proposed it, but of the committee reporter, the Ministry having no more power over its fortunes than flows from the fact that they are the leaders of the majority and can speak in its support. There are also many bills brought in by private members; and these also go to the committees and have apparently a better chance than private bills in England.

Switzerland, like America, but unlike France, has no Ministers as voting members of either Chamber, but they are allowed to speak and defend their policy or advance a measure, in either the House or the Senate. The importance of the Legislature has, however, been reduced by the free use made of the popular vote or so-called referendum.

Both these intermediate systems lose something of the momentum which the responsibility of government for legislation gives in England, but they also reduce the merely party opposition which it has to encounter, while they give to the preparation and passing of measures the advantage of the co-operation of those whose administrative experience enables them to perceive what is really wanted and to judge how it had best be attained.

Whether it is possible to establish in this country consistently with the provisions of the Federal and the State Constitutions any scheme by which the Executive can be rendered more helpful to the Legislature or by which Legislatures can be more completely organized for the purposes of legislation, with a more authoritative leadership, these are questions for you on which I can hazard no opinion. As in the British Constitution promptitude of action and concentration of power have been so fully attained that some critics think that stability is insufficiently secured, so your system in establishing stability by an elaborate system of checks and balances may have sacrificed some of the motive power required to push legislation forward. Apart, however, from these large questions, which I indicate in passing, there may be improvements consistent with your Constitutions and with our Constitution which each country may effect. It is the experience of all civilized countries that scientific method, which has been applied to everything else, also needs to be applied more fully and sedulously to the details of constitutional and political organization than is now the case. And if one may judge from the recent action of your States there are certain changes already in progress. The sittings

of Legislatures have been made less frequent and shorter and as sessions grow shorter State Constitutions grow longer. Not only many subjects but even many minor details of legislation have been withdrawn from the Legislature by being placed in the State Constitution which the Legislature cannot change. The demand is moreover made by some reformers that Congress shall deal with topics which formerly were left entirely to the State. Whether this be wise or not is a matter on which I cannot venture to speak. But it is another sign of the times.

Let me try to illustrate how scientific method may be applied to the constructive part of legislation and the arrangements of Legislatures. It may be applied to the collection of data. The facts on which laws ought to be based need to be gathered, sifted, critically examined. Especially necessary is it to ascertain not only how other countries have legislated on the subjects which occupy public attention here but what has been the practical working of the laws they have enacted.

Take such subjects as the tariff and the law of corporations. Every civilized country has to deal with corporations and has the same task, to keep them under some control, and to prevent them from establishing oppressive monopolies, yet always without checking individual enterprise. Every one, except the monopolist, wishes to stop monopolies, but nobody wants to substitute a meddling officialism. How to steer between these two risks is no easy problem, and needs scientific inquiry, with an examination of the laws of other countries.

Any country that has a system of customs duties meant to be protective, needs to know how each duty, whether on raw materials or on the manufactured article, operates upon the manufacturer, the dealer, the consumer; and the more complex and all-embracing a tariff is, the greater this need. Now, both these subjects are beyond the knowledge and the skill of the ordinary legislator either in Europe or here. Only special study can give the knowledge and skill required to competently advise the person who has to prepare measures on either subject. The same thing holds true of railroads, of mines, of factories, of sanitation, of irrigation, of forest conservation and many other topics of current interest. All must be approached in a scientific way, using the results of the experience of other countries.

Methods, too, have to be studied as well as facts. To devise and apply sound methods of legislation is equally a matter requir-

ing careful study and a knowledge of the systems which have succeeded elsewhere. For instance, a distinction ought to be drawn between the work proper to a legislative body and that which is better left to some administrative or judicial authority, making rules under a power delegated by the Legislature. Administrative rules are better made in that way, and the time of the Legislature is saved. Similarly, bills relating to local and personal matters ought to be distinguished from those which affect the general law. The more these local matters, in which the pecuniary interests of persons or corporations are involved, can be kept apart from politics, the better. They are usually fitter for a sort of investigation, judicial in its form, though not necessarily conducted by lawyers. To take them out of the ordinary business of a Legislature saves legislative time, while it removes temptation. It sets the members of a legislative body free to deal with the really important general issues affecting the welfare of the people which are now crowding upon them. It helps them to appeal to the people upon those general issues rather than in respect of what each member may have done for the locality he represents.

Let me sum up in a few propositions, generally applicable to modern free countries, the views to which I have sought to direct your attention.

I. The demand for legislation has increased and is increasing both here and in all highly civilized countries.

II. The task of legislation becomes more and more difficult, owing to the complexity of modern civilzation, the vast scale of modern industry and commerce, the growth of new modes of production and distribution that need to be regulated, yet so regulated as not to interfere with the free play of individual enterprise.

III. Many of the problems which legislation now presents are too hard for the ordinary members and even for the abler members of legislative bodies, because they cannot be mastered without special knowledge. (It may be added that in the United States a further difficulty arises from the fact that legal skill is often required to avoid transgressing some provision of the Federal or a State Constitution.)

IV. The above conditions make it desirable to have some organized system for the gathering and examination of materials for legislation, and especially for collecting the laws passed in other countries on subjects of current importance.

V. To secure the pushing forward of measures needed in the

public interest, there should be in every Legislature arrangements by which some definite person or body of persons become responsible for the conduct of legislation.

VI. Every modern Legislature has more work thrown on it than it can find time to handle properly. In order, therefore, to secure sufficient time for the consideration of measures of general and permanent applicability, such matters as those relating to the details of administration or in the nature of executive orders should be left to be dealt with by the administrative department of government, under delegated powers, possibly with a right to disapprove reserved to the Legislature.

VII. Similarly, the more detailed rules of legal procedure ought to be left to the judicial department or some body commissioned by it, instead of being regulated by statute.

VIII. Bills of a local or personal nature ought to be separated from bills of general applicability and dealt with in a different and quasi-judicial way.

IX. Arrangements ought to be made, as, for instance, by the creation of a drafting department connected with a Legislature or its chief committees, for the putting into proper legal form of all bills introduced.

X. Similarly, a method should be provided for rectifying in bills before they become law such errors in drafting as may have crept into them during their passage.

XI. When any bill of an experimental kind has been passed, its workings should be carefully watched and periodically reported on as respects both the extent to which it is actually enforced (or found enforcible) and the practical results of the enforcement. A department charged with the enforcement of any act would naturally be the proper authority to report.

XII. In order to enable both the Legislature and the people to learn what the statute law in force actually is, and thereby to facilitate good legislation, the statute law ought to be periodically revised, and as far as possible, so consolidated as to be brought into a compact, consistent and intelligible shape.

I venture to submit these general observations because at this time one observes everywhere an unusual ferment over economic and social questions, and an unusually loud demand for all sorts of remedies, some of them crude, some useless, some few possibly pernicious. Here, in the United States, this ferment takes a form conditioned by your constitutional arrangements and your political

habits. There seems to be in many quarters a belief that the State governments cannot deal with some of the large questions that interest the whole country. Yet there is also a fear to disturb the existing balance of powers and functions between the State authorities and the National government. There is a feeling that evils exist which governments ought to deal with, and for dealing with which the existing powers of governments ought to be extended. Yet there is also a dread of officialism and of anything approaching the bureaucratic interference of continental Europe. Discontent is qualified by doubt. The reforming spirit runs with a strong current, but it is arrested by the conservative habits of a people who value the old institutions and realize how much caution is needed in modifying them. So, again, there is a disposition to criticize State governments and city governments, and to appeal to good citizens, as voicing the best public opinion, to step in and do whatever useful work those governments are failing to do. But how is public opinion to be organized, concentrated, focused? Who are the persons to give it that definite and authoritative expression which will enable it to prevail? These are some of the problems which appear to be occupying your minds, as, under different forms, they occupy us in Europe. They will, doubtless, like other problems in the past which were even harder, be all solved in good time, solved all the better because there is here in America, little of that passion which has at other times or in other countries overborne the voice of reason.

Meantime, as there is evidently a good deal of legislation before you, every improvement in the machinery of legislation and the conditions of legislation that can be made is worth making, every light that the experience of other countries can suggest, is worth receiving and using.

The great profession to which you belong has a special call to exert in this direction its influence, which has often been exerted for the benefit of the nation. You know such weak points as there may be in the existing legislative machinery. You know them as practical men who can apply practical remedies. If you see a public benefit in separating different classes of bills and treating the special or local and personal bills in a different way from the public ones, you can best judge how this should be done. You have daily experience of the trouble which arises from obscurities or inconsistencies in the statutes passed, of the wasteful litigation due to the uncertainty of the law, with all the expense and vexation

which follow. You are, I hear on all hands, not satisfied with the criminal procedure in many of your States. These are matters within your professional knowledge. You can, with the authority of experts, recommend measures you deem good, and remonstrate against those that threaten mischief; and I understand that remonstrances proceeding from the Bar are frequently effective.

Some cynical critics have suggested that the legal profession regard with equanimity defects in the law which may increase the volume of lawsuits. The tiger, it is said, cannot be expected to join in clearing away the jungle. This splenetic view finds little support in facts. Allowing for the natural conservatism which the habit of using technical rules induces, and which may sometimes make you over-cautious in judging proposals of change, lawyers have, both here and in England, borne a creditable part in the amendment of the law. It is a great mistake to think they profit by its defects. Where it is clear and definite, where legal procedure is prompt and not too costly, men are far more ready to resort to the Courts for the settlement of their disputes. It is uncertainty, delay and expense that lead them to pocket up their wrongs and endure their losses. Even, therefore, on the lower ground of self-interest, the Bar has nothing to gain by a defective state of the law. But apart from this, every man who feels the dignity of his profession, who pursues it as a science, who realizes that those whose function it is thoroughly to understand and honestly apply the law, are, if one may use the somewhat highflown phrase of a great Roman jurist, the priests of justice,—every such man will wish to see the law made as perfect as it can be. So, too, whoever realizes, as in the practice of your profession you must do, how greatly the welfare of the people depends on the clearness, the precision, the substantial justice of the law, will gladly contribute his knowledge and his influence to furthering so excellent a work. There is no nobler calling than ours, when it is pursued in a worthy spirit.

Your profession has had a great share in molding the institutions of the United States. Many of the most famous Presidents and Ministers and leaders in Congress have been lawyers. It must always hold a leading place in such a government as yours. You possess opportunities beyond any other section of the community for forming and guiding and enlightening the community in all that appertains to legislation. Tocqueville said seventy years ago: "The profession of the law serves as a counterpoise to democracy."

We should rather say that it has given democracy its legal framework, and it keeps that framework in working order. To you, therefore, as an organized body of lawyers, one may fitly address these observations on legislative methods drawn from the experience of Europe. We live in critical times, when the best way of averting hasty or possibly even revolutionary changes is to be found in the speedy application of remedial measures. Both here and in Europe improvements in the methods of legislation will not only enable the will of the people to be more adequately expressed, but will help that will to express itself with prudence, temperance and wisdom.

What is legislation but an effort of the people to promote their common welfare? What is a Legislature but a body of men chosen to make and supervise the working of the rules framed for that purpose? No country has ever been able to fill its Legislatures with its wisest men, but every country may at least enable them to apply the best methods, and provide them with the amplest materials.

Never, I think, since the close of the Civil War, has there been among the best citizens of the United States so active a public spirit, so warm and pervasive a desire to make progress in removing all such evils as legislation can touch. Never were the best men, both in your Legislatures and in the highest executive posts, more sure of sympathy and support in their labors for the common weal.

JAMES BRYCE.

WASHINGTON, D. C.

ADMIRALTY LAW.

I have been asked by the Editors of the REVIEW to write an article on Admiralty Law. I am glad to comply because I have sometimes feared that the subject has not been given sufficient attention by our schools of law.

I do not know this to be the fact, but in conference with the graduates of several of our leading schools I am informed that in some, at least, the subject is given scant attention, and, in others, it is touched only in a prefunctory and artificial way. If this be true to-day it should not be true in the future, and especially should it not be true of those schools which are located near the busy seaports of our country which are great centers of admiralty jurisdiction.

I note in a school pamphlet of "Announcement" for 1907-1908 the following: "Second year, Admiralty, two hours, first half year." How thoroughly the subject can be treated in this time I am not advised. I do not assume for a moment to criticise the accomplished specialists who direct the curriculum of our leading law schools, but my contention is simply this: that the student intending to practice his profession at a seaport or lakeport, or at a city located on one of the great rivers which carries a vast inland commerce, should, if he desires, be able so to perfect himself in maritime law that he may on graduation be qualified for practice in the admiralty courts. Many reasons should induce him to seek preferment in this direction. The members of the admiralty bar are a select body of lawyers. I suppose there are unworthy men among them, but, after an experience of twenty-five years in the hearing of admiralty causes in the first instance and on appeal, I can say that I have never known an instance where I had reason to believe that the proctor or advocate was attempting to mislead the court or deceive his client. The sea lawyer seems unconsciously to absorb many of the characteristics of the bluff, fearless, honest, outspoken men who "occupy their business in great waters." Unlike the practitioner in our courts of common law the admiralty lawyer is not hampered by a code containing 3441 directions as to the manner in which he must proceed. He seeks results, and he generally gets them. He is not lost in a labyrinth of technicalities from which he can only emerge by a ruinous expenditure of his own time and his client's money. Rare indeed is a cause in

admiralty where the amount involved is wasted in fribbling motions and appeals over puerile points of practice. If the admiralty lawyer has a good cause of action or a good defence he can bring it speedily before the court and have it decided, while yet the code lawyer is struggling with demurrers, motions to strike out, motions to make more definite and certain and motions for bills of particulars. The admiralty judges have as little respect for these attempts to befog the main issue and postpone the hearing on the merits as Napoleon had for the war rules of the great Frederick which had been the code of tactics of Europe for half a century.

When the captains of the old régime found their armies defeated, as the result of some brilliant stratagem never practiced before, they endeavored to console themselves by the assertion, "There is nothing like this in the code, it is not war." They soon learned that though it was not in the code, it accomplished results and spelled success.

Thus do the admiralty judges cut through technicalities with a ruthless hand in their endeavor to get at the truth. If the proper parties to enable the court to reach a correct determination have not been summoned, they are brought in by subsequent process. If the pleadings are not drawn to permit such a result, they are forthwith amended.

It is almost pathetic, at times, to note the surprise and consternation which overwhelms the code practitioner who occasionally drifts into the admiralty courts armed with a battery of "points" which might serve for many a long delay in the state courts. As these are met and brushed aside and he finds himself being drawn with relentless precision toward the fatal moment when he must stand weaponless and bare before his adversary, the truth suddenly dawns upon him that the lawyer who has no case on the merits will do well to avoid the courts of admiralty.

I once heard a lawyer, who had emerged from a somewhat disappointing session of this kind, exclaim, in a tone of lament not, however, unmixed with admiration, "It took that judge just fifteen minutes to do what could not have been done in the state court in six months."

If a student intends to be a specialist—and in the large cities all branches of the law are becoming specialized—there are many reasons which should attract him to the law of the sea. The high character of the admiralty bar, the special training of the judges, the wide range of interesting subjects with which the law deals,

the certainty of the judgment being paid which results from the proceedings, in a vast majority of instances, being *in rem,* and the freedom from the delays, disagreements, compromises and miscarriages incident to jury trials, all combine to make this a peculiarly alluring field of endeavor.

The law of the sea, like the law of the land, is founded upon broad general doctrines common to all jurisprudence. All law should be, and generally is, founded on common sense. Commercial law, whether it relates to maritime or inland transactions, whether it be enforced in the admiralty or the courts of common law, broadly speaking, is based upon the same reason and is designed to accomplish the same results. The counselor, therefore, who is competent to deal with the ordinary questions which arise in the course of a general practice, who is familiar with the principles of equity and the common law and who is gifted with that rare mental faculty which enables him to analyze and apply them successfully to the case in hand, need not hesitate to enter the precincts of the admiralty. He will find that the rules of right are well-nigh universal; that if his client could succeed, upon a given state of facts, in a court of common law, he will have no difficulty in reaching the same result in a court of admiralty.

There is a prevalent idea that the study of maritime law is only necessary for those who intend to make this branch a specialty, and for those who intend to engage in general practice the time so spent is not spent wisely. This is a grave mistake. The distinctive features of the law and practice in admiralty can readily be acquired and retained and are absolutely essential to the ordinary practitioner. I have known instances where lawyers, whose practice had been exclusively in the state courts, who never filed a libel or asserted a maritime privilege, have removed to seaport towns, and because of their aptitude and ability have entered the lists against the admiralty specialist with success. The legal athlete is at home everywhere. It is as immaterial to him in what forum he struggles as it is to an experienced marksman whether he stands upon the rampart of a fort or the gun-deck of a ship of war.

The admiralty jurisdiction now extends to almost every part of the country. The jurisdiction of the state and United States courts is so often concurrent and the line of demarkation between them so shadowy and uncertain that cases are continually arising in which a lawyer ought not to attempt to advise his client without fully understanding the law of each. Cases are not infrequent

where a lawyer has advised his client to his ruin and lost his own reputation as a safe counselor, simply because he was ignorant of a maritime lien which could be summarily enforced by a proceeding *in rem.*

The case of *Belden* v. *Chase*[1] will serve as an example. The cause of controversy was a collision between the steamer *Vanderbilt* and the pleasure yacht *Yosemite* on the Hudson River. The *Vanderbilt* was sunk. The cause was tried three times before the Supreme Court of New York and a jury. It went three times to the General Term and twice to the Court of Appeals. At the last trial the jury rendered a verdict of $27,668 against the owners of the yacht. The judgment entered on this verdict was affirmed by the General Term and the Court of Appeals. A writ of error was then granted by the Supreme Court of the United States and the judgment was reversed upon the ground that the state courts had erred in construing the Act of Congress as to the lights the yacht should carry and also upon the ground that the *Vanderbilt* was clearly at fault. Had this suit been brought originally in admiralty, it is more than probable that the owners of the *Vanderbilt* would have recovered half the damages, or $13,834, and that this sum would have been paid within a year. As it was, after thirteen years of litigation the plaintiff found himself with a judgment of several thousand dollars and costs against him. Of course, I mean no reflection upon the able counselors who conducted the case for the plaintiff. It is probably true that seven out of every ten of the up-state lawyers would have commenced the suit in the state court, but that was a quarter of a century ago, when students read law in offices where an admiralty suit was almost unknown. It should not be so now when a law school education is within the reach of a great majority of students. It is difficult to imagine a locality to-day where a lawyer may not be called upon to apply the principles of the Limited Liability Act,[2] the Harter Act,[3] the rules adopted by Congress for preventing collisions at sea and on inland waters,[4] and the state statutes giving a lien for supplies furnished vessels in their home ports, which lien, following the rule laid down in *The Lottawanna,*[5] is only enforceable in the admiralty courts.

I recall an instance where an attorney attempted to enforce

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[1] (1893) 150 U. S. 674. [2] 9 U. S. Stat. L. 635. [3] 27 U. S. Stat. L. 445.
[4] U. S. Compiled Stats., Vol. 3, pages 2863-2900.
[5] (1874) 21 Wallace 558.

this lien for supplies in the state courts and, when he finally was made aware of the fact that he was in the wrong jurisdiction, it was too late for him to enforce the lien in admiralty.

The principles of the law of the sea are very old. It has been administered from the earliest times. Its origin is lost in tradition, but compared with the law governing other relations it is one of the exact sciences. The reason is plain. It has been untouched by the bungling hand of the legislative tinker. It has been administered by comparatively few judges, who have been jurists of exceptional ability. Their written judgments have been few, but these were distinguished by wealth of erudition and cogency of reasoning.

The law in its main features is to-day what it was when Venice ruled the Levant, and the commerce of the East passing down the Baltic made the merchants of Wisbuy the princes of the northern seas.

The result is that in this domain the law is clear, well settled and easily understood. We escape the discordant clash, the conflicting jargon, the despairing uncertainty which are encountered in other branches of the law. After contemplating the vast amount of machine-made law with which the state court practitioner is annually inundated—laws enacted to meet some passing exigency or to quiet the unreasoning demand of political clamor, laws which, if they escape being declared unconstitutional, are sure to be construed by courts or amended by the Legislature until all semblance of the originals is lost—the student returns to the comparatively immutable law of the sea with something of the feeling with which the explorer, lost amid the terrors and dangers of an African jungle, returns to his camp on the broad meadow beside the cool and refreshing spring. The admiralty lawyer relies on compass and stars to reveal the way through the wilderness of law, while the code practitioner is too often compelled to waste precious time in searching for bewildering trails blazed by others upon the trees.

As before observed, the broad doctrines of the law are applicable to all relations. There are, however, many modifications in the law of the sea, made necessary by the changed conditions. The sea is the common meeting place of all nations; the highway of all. Over its limitless and trackless plains passes the commerce of every clime. The dug-out of the savage is as free there as the steel Cunarder, her sharp bow cutting the waves with the speed of a locomotive. With every ship, with every flag, goes the sovereignty

of the nation whose emblem it is. Vessels of endless size and shape, carrying the merchandise of a hundred climes, manned by sailors speaking different tongues, mingle and compete for the rewards of commerce in this strange federation of the sea.

It is manifest that for such relations and conditions, international in character, there must be international laws applicable to all classes. From the earliest times such laws have existed. As commerce increased it became necessary for the safety and interests of all that there should be a common code of conduct which should be universally respected and for the infraction of which all should suffer. In the earliest days the affairs of the sea were administered by a high naval officer called an Admiral, hence the term "Admiralty," which relates to the class of cases which originally came under the cognizance of the admiral. His was an iron and autocratic rule, simple in its character, swift in its judgment. This was the beginning of the Admiralty Law which, like all law, had its origin in force. The Admiralty law partakes of the nature of the civil law for the reason that the countries which first adopted a code of maritime regulations were under the rule of the Roman law. Being thus firmly established, the necessity for universality has induced England and America, though not without a struggle and against the protest of the admirers of the common law, to adopt a system which to-day is thoroughly accepted by the most uncompromising worshippers of democratic institutions and traditions.

The most ancient code of maritime law was that of the Rhodians. These laws were promulgated shortly after the reign of King Solomon, about 900 B. C. Their authority was acknowledged by Greece and Rome, and all the countries bordering upon the Mediterranean.

The laws of Oleron are conceded to be the foundations of all European maritime codes. Their precise origin is lost in remote antiquity and the best tribute to their worth is found in the fact that England and France have long contended for the honor of originating them. Oleron—where these laws were enacted in the reign of St. Louis—is an island of France which lies beside the mouth of the river Charente, in ancient Guienne. They formed the basis of the celebrated Ordinance of Louis XIV, and are admitted in England and America as authority as well in courts of common law as in those of admiralty. Besides commercial regu-

lations these laws contain the rules which have existed to this day defining the rights of belligerent and neutral vessels.

Next in importance may be cited the laws of Wisbuy. Wisbuy was the ancient capital of Gothland, an island of the Baltic sea, situated about 130 miles south of Stockholm. Its foundation is unknown, but it first emerged from obscurity during the 11th century. It rapidly grew in importance as a commercial mart. No city in Europe was so thronged with merchants and so celebrated for its commerce. All nations were represented there. As trade increased it rose in splendor and opulence. Magnificent buildings, stately temples, wide thoroughfares adorned by splendid works of art evidenced the wealth and liberality of its merchant princes. To-day nothing but ruins attest its ancient splendor. The magistrates of the city had jurisdiction, or rather the arbitrament, of all causes or suits relating to sea affairs. Their ordinances were submitted to in all such cases and passed for just at all the ports of Europe, from Muscovy to the Mediterranean.

These laws, which some contend are more ancient than the laws of Oleron, are quoted to-day in the admiralty courts of this country, and the maritime codes of many countries of Europe have been based upon them.

Another celebrated code of sea laws was established by the Hanse, or "League" towns about the middle of the thirteenth century, 1241. The object of the Hanseatic League was primarily to facilitate trade, to secure immunity from the dangers which then beset all forms of transportation, and, finally, to secure a monopoly of the commerce of the Baltic.

The principal cities of the league were Lubec, Brunswick, Dantzic, Cologne, and Hamburg in Germany; but it subsequently extended its influence to London, and Novogorod in Russia, and through the principal cities of Germany; constituting a rich and powerful maritime confederacy. The Hanse towns flourished for 200 years, controlling the bulk of the world's commerce, but, like all monopolies, the League became tyrannical and opposed itself hopelessly to the march of progress.

Though to a great extent a re-enactment of what had existed before, the laws of the Hanse Towns are still quoted with respect in the admiralty tribunals of the world.

These three codes, the laws of Oleron, the laws of Wisbuy and the laws of the Hanse Towns, are the most important of the ancient codes.

These antique laws contain rules applicable to all maritime situations and conditions. They are the three arches upon which rests the modern admiralty structure.[6]

The jurisdiction of the United States courts is clearly such as is given by the Constitution and laws of Congress. They are courts of limited jurisdiction. The Constitution, Article III, Section 2, provides that the Federal government shall have power over "All cases of admiralty and maritime jurisdiction." This is the sole allusion to the subject in the Constitution. It is the only grant, the sole foundation upon which the admiralty jurisdiction rests. The evident intention of the framers of the Constitution was to remove this great branch of law, international and general in character, from the conflicting legislation and adjudications of the courts of the several states. The language of the Constitution now seems plain enough, but the contention which arose regarding it has continued through a century and is hardly yet set at rest. The view which is gradually but surely being adopted by the Supreme Court is that the framers of the Constitution intended to give a broad control of all matters of admiralty and maritime jurisdiction to the United States courts, the words being interpreted as they are understood in their commercial sense among enlightened maritime nations, the word "ALL" being construed to mean *all*, and not a part.

Some important questions growing out of the diversity of opinion as to the interpretation of the Constitution are still open, but at present the discussion is practically set at rest, the jurisdiction of our courts having been extended until it covers all matters to which, by any fair construction, the words admiralty and maritime can apply.

The most fruitful source of litigation in admiralty may be treated under the head of collision. When we remember that even on the ocean the tracks of the innumerable vessels which cross and recross are confined to narrow lanes, and on smaller bodies of water to still more circumscribed limits, that storm, fog and darkness often make it impossible for the bewildered sailor to see his course, and roaring tempests and atmospheric conditions make it impossible to hear impending danger and warning signals, the wonder is not that collisions are so frequent, but that they occur

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[6] A translation of these laws will be found in the appendix to Peters' Admiralty Decisions, Vol. I. A translation of the Marine ordinance of France will be found in Vol. II, *Id.*

so seldom. Let one who is sceptical as to the marvelous skill displayed in the management of ships stand on the Battery and look out over one of the most magnificent harbors in the world. He will gaze with amazement at the myriad vessels as they meet, pass and cross each other with the same freedom that individuals meet and pass upon a crowded plaza. Yonder is a stately ocean steamer, or, perhaps, a ponderous war ship moving slowly down the river. Over toward the Staten Island shore a fleet of ships is riding at anchor. Down the East River speeds a pleasure yacht with a cloud of canvas spread. From Brooklyn and New Jersey, up and down both rivers in every direction, come and go those huge, ungainly turtles, the ferryboats, while twisting in and out steam-tugs in countless numbers; some alone, others with barges lashed to their sides, are screeching, puffing and bustling about. Let him add to this an endless variety of scows, dredges, lighters, sloops, schooners, floating elevators and the other ungainly monstrosities of commerce, and he will form a slight idea of the ever-changing nautical panorama of the waters which encircle Manhattan Island.

Let him realize, further, that this scene is being repeated at night as well as by day, in fog and storm as well as in clear weather, in the harbor of every seaport on the globe, and he will be prepared to admit the skill and nerve of those who direct the movements of this multitude of floating objects with a judgment so clear and a precision so unerring. And yet it is safe to assume that one-half the time of the admiralty courts in this country is devoted to collision causes.

Congress has provided a number of regulations, international in character, for the guidance of sailing vessels and steamships. These regulations must be understood, in their main provisions at least, by every lawyer who undertakes to advise his clients in a collision case, whether the collision occurs on the ocean, the great lakes or navigable rivers. Where there is a failure to observe these, and also the rules of good seamanship which custom has ordained, negligence is established, unless the circumstances are exceptional.

It is a curious circumstance that the ordinary sailor, even though he has reached the position of master, is sceptical as to the propriety of following any rule made by landsmen. The practical sailor assumes that he is better qualified than the lawmaker to say

what shall be done in a given case of danger. This antipathy was well illustrated by the remark of an ancient mariner in a case arising in the Southern District of New York a few years ago. When asked his reason for failing to observe one of the international rules he replied, "As I understand it those laws were made by them that don't understand it."

These steering and sailing rules have now been extended by Congress to the great lakes and to all inland waters and, notwithstanding the stubbornness of some navigators in refusing to recognize them, they undoubtedly represent the best judgment of the most competent navigators of the world.

No more interesting litigation can arise than a hotly contested collision case. To the well-equipped advocate no keener enjoyment can be imagined than the intellectual struggle which such a contest affords, involving, as it may, not only an accurate knowledge of the law, but also of the science of navigation. For the time being his "home is on the deep," surrounded by a new race of vikings, talking a strange *patois,* but as ready as of old to stand by the ship in word and deed so long as a spar remains above the surface. I think it may be said with truth that when the crews of two colliding ships clash on the witness stand there is more false swearing and less perjury than in any other form of litigation. They do not intend to mislead, they simply cannot see any fault in their own navigation. No matter how gross may be their carelessness it is always "the other fellow" who is to blame.

And it is a curious psychological fact that when passengers are aboard they appear to be controlled by the same obsession.

But collision cases are by no means the only interesting ones disposed of in the admiralty courts. The range of subjects is broad and embraces salvage, bottomry, respondentia, materialmen, general average, afreightment, charter-party, bill of lading, towage, pilotage, maritime loans, wharfage, demurrage, insurance, common carriers, prize, seizure, survey and sale and petitory actions.

It would extend this paper beyond all reasonable limits if I were to refer at any length to the numerous causes involving a consideration of these subjects which are being constantly considered by the courts.

Where can be found cases presenting questions of greater interest than the following, which will serve as an illustration of the many hundred which, in recent years, have been tried in the

Southern District of New York: *The St. Paul,*[7] *The Germanic,*[8] *La Bourgogne,*[9] *The Mauch Chunk,*[10] and *The City of Lowell.*[11]

The personnel of the admiralty bar is rapidly changing. Within the last two years the Nestor of the bar has been compelled by ill health to retire from active practice, several of its leaders have died, others have been promoted to the bench, and we are admonished by advancing age that a number of the old veterans are now on the firing line and may drop from the ranks at any moment. Younger men must fill the places thus left vacant and, if they are to keep the blazing torch alight, they must, while in the law schools, lay broad and deep the foundations of their knowledge.

ALFRED C. COXE.

UTICA, N. Y.

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[7] (1897) 82 Fed. Rep. 104.
[8] (1903) 124 Fed. Rep. 1; (1905) 196 U. S. 589.
[9] (1905) 139 Fed. Rep. 433. [10] (1907) 154 Fed. Rep. 182.
[11] (1907) 152 Fed. Rep. 593.

THE ELEVENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.[1]

Of the important questions of constitutional law now before the country, none more vitally affects the peace and harmony of our dual system of government than that of the power of a federal court to enjoin a state officer from enforcing the provisions of a state statute in conflict with the Constitution of the United States. This question usually arises in connection with the Eleventh Amendment, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." Serious controversies regarding the issue of injunctions by federal courts against state officers have arisen in New York, North Carolina, Alabama, Missouri, Kansas, Minnesota, and other States. A convention of Attorneys-General from a number of States, held at St. Louis in September and October, adopted a memorial to the President and Congress praying that the jurisdiction of the circuit courts of the United States might be curtailed in respect of suits brought to restrain state officers from enforcing state laws or the orders of state administrative boards. The President in his annual message to Congress called the matter to the attention of that body, and stated that discontent was often expressed with the use of the process of injunction by the courts where state laws were concerned. As soon as Congress assembled, numerous bills were introduced proposing to curtail the power of the federal courts to issue injunctions and several joint resolutions to amend the Constitution of the United States in that respect were also introduced. The question will, perhaps, figure prominently in the next presidential campaign. It may, therefore, be useful and interesting at this time to review the history of the Eleventh Amendment in order to see what light it throws upon the intention of its framers. Did they intend, in prohibiting suits by an individual against a State, likewise to deny to the courts of the United States the power to enjoin a state officer from enforcing a state statute in conflict with the national Constitution?

[1] An address delivered by William D. Guthrie before the New York State Bar Association at its Annual Meeting held in New York City, January 25, 1908.

In 1787 and 1788, when the adoption of the Constitution was under consideration by the people of the United States, conflicting views were entertained as to the suability of a State by an individual for the recovery of claims against it. Hamilton, Madison and Marshall expressed the opinion that a State would not be suable by an individual under the Constitution as drafted. A number of prominent men, conspicuous among whom were Edmund Pendleton, Patrick Henry and George Mason, were of opinion that the language of the judicial clause conferred jurisdiction to entertain and determine such a suit. Some urged this as an objection to the Constitution. Others, including James Wilson, of Pennsylvania, and Edmund Randolph, of Virginia, two of the most distinguished lawyers and publicists of the day and members of the Constitutional Convention, contended not only that jurisdiction was conferred but that it was wise and necessary that such jurisdiction should exist. Wilson urged that "when a citizen has a controversy with another State, there ought to be a tribunal where both parties may stand on a just and equal footing," and Randolph argued that the jurisdiction would tend "to render valid and effective existing claims, and secure that justice, ultimately, which is to be found in every regular government." The Constitution was adopted as submitted with the understanding that amendments would be promptly proposed. The First Congress submitted twelve amendments, ten of which were adopted, but the subject of the suability of a State was not mentioned in any of them.

The question shortly arose for judicial decision in an action brought by Chisholm, a citizen of the State of South Carolina, against the State of Georgia in the Supreme Court of the United States under its original jurisdiction.[2] The action was in assumpsit to recover a debt. The court then consisted of Chief Justice Jay and Justices Cushing, Wilson, Blair, Johnson and Iredell. On February 18, 1793, the court held, Mr. Justice Iredell alone dissenting, that under the Constitution as originally adopted a State could be sued in that court by a citizen of another State in an action of assumpsit to enforce the payment of a contract debt. This decision, which was followed by the commencement of the suit of *Vassal* v. *Massachusetts,* created irritation and alarm among the States and particularly among those which were heavily burdened with debt. The anti-Federalist prints were loud in invectives against the decision, which was termed a viola-

[2] 2 Dall. 419.

tion of the sovereignty of the States, and it was declared that the people were "called upon to draw their swords against this invasion of their rights." It has been said, though with some exaggeration, that "the States fairly rose in rebellion against the decision." Four States formally protested. Although Georgia had been the first State to invoke the original jurisdiction of the Supreme Court, it nevertheless refused to appear in the *Chisholm* suit, and filed a remonstrance and protestation against the exercise of jurisdiction. After the decision, it openly defied the authority of the national judiciary. Indeed, it is stated by McMaster, Cooley and other writers that the legislature of Georgia at once passed a law subjecting to death without benefit of clergy any officer who should attempt to serve a process in any suit against the State, but no record of any such statute can be found. As has been suggested, it was probably a proposed bill which passed only the lower branch of the legislature. The legislatures of Virginia, Massachusetts and Connecticut instructed their senators and representatives to secure the adoption of an amendment to the Constitution which should prevent suits against a State by an individual.

On February 20, 1793, two days after the opinions in *Chisholm* v. *Georgia* were delivered, a resolution was offered in the United States Senate proposing an amendment of the Constitution in the following terms:

"The judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State."

The proposed amendment was debated to some extent in the Second Congress, but it was not then passed, and went over to the next Congress. In the Third Congress, on January 2, 1794, Caleb Strong, one of the Senators from Massachusetts, moved the adoption of a resolution which changed the form of the proposed amendment so as to read as follows:

"The judicial power of the United States shall not *be construed to* extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

The amendment was finally accepted in this form on March 4, 1794, and at once submitted to the legislatures of the several States for ratification, but up to March, 1797, there were still eight States which had not acted, probably because the political clamor had sub-

sided, and there was no longer any excitement on the subject. In fact, Congress had to request the President to communicate with the outstanding States. Finally, in a message from President Adams to Congress dated January 8, 1798, the proposed amendment was declared to have been ratified by three-quarters of the States, and it thereupon became the Eleventh Article of Amendment to the Constitution of the United States. New Jersey and Pennsylvania had refused their ratification, while South Carolina and Tennessee had not then acted upon it.

The unusual and peculiar wording of the amendment first attracts attention. Instead of declaring how the Constitution shall read in the future, it declares how it shall "not be construed." This phraseology was used for political reasons and out of concession to the susceptibilities of the advocates of state rights. Extremists wanted a declaration that would not only overrule the recent construction of the Constitution by the Supreme Court and deny that such a power had ever existed, but would also oust all jurisdiction in pending as well as future cases. The amendment, therefore, does not purport to amend or alter the Constitution, but to maintain it unchanged, while controlling its scope and effect by authoritatively declaring how it shall not be construed.

Speaking of the language of the amendment, Chief Justice Marshall said in *Cohens* v. *Virginia*[3]: "It is a part of our history, that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts formed a very serious objection to that instrument. Suits were instituted, and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the court still extends to these cases; and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which

[3] 6 Wheat. 264, 406.

might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.

"The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a State is made by an individual in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation."

It will also be observed that the amendment does not refer to suits against a State by one of its own citizens. This was undoubtedly because the Constitution did not extend the judicial power of the United States, when dependent upon the character of the parties, to controversies between a State and its own citizens, but only to controversies between a State and citizens of another State, or citizens or subjects of foreign States. The distinction between jurisdiction dependent upon the nature or subject matter of the controversy irrespective of the character of the parties, such as cases arising under the Constitution, laws and treaties of the United States, and jurisdiction dependent upon the character of the parties irrespective of the nature or subject matter of the controversy, had probably not then been as clearly indicated as was subsequently done by Chief Justice Marshall. The failure of the Eleventh Amendment to mention suits against a State by its own citizens gave rise nearly one hundred years later to the contention that a State could be sued in a circuit court of the United States by one of its own citizens in a case arising under the Constitution. This was urged at the October term, 1889, in *Hans* v. *Louisiana* and *North Carolina* v. *Temple*,[4] but the court overruled the contention, and held that a State could not be sued

[4] 134 U. S., 1 and 22.

by an individual in a United States court even in a case arising under the Constitution. Mr. Justice Bradley delivered the opinion of the court. He criticized the reasoning of the majority in *Chisholm* v. *Georgia,* and preferred the dissenting opinion of Mr. Justice Iredell to the effect that, under the Constitution as originally adopted, no suit could be maintained against a State by an individual to enforce its debts except by its consent. Mr. Justice Harlan, however, while concurring in holding that a suit directly against a State by one of its own citizens to enforce a debt was not within the judicial power of the United States, disapproved of the comments made by Mr. Justice Bradley upon the decision in *Chisholm* v. *Georgia* as not necessary to the determination of the case, and expressed the opinion that the prior decision was based upon a sound interpretation of the Constitution as that instrument then was.

It has been stated in opinions of the Supreme Court that a State can be sued in a court of the United States by an individual if it waives its immunity and consents to be sued. But it is difficult to perceive how the consent or waiver of a State can, in any case and under any circumstances, confer upon the federal courts jurisdiction of a suit against it by a citizen of another State or a citizen or subject of a foreign State in the face of the imperative mandate of the amendment that "the judicial power of the United States shall *not be construed to extend* to" any such suit. It is true that the court in the case of *Clark* v. *Barnard*[5] said that the immunity of a State from suit in a federal court was a personal privilege which it might waive at pleasure and that its appearance as a party defendant in a court of the United States would be a voluntary submission to its jurisdiction, but in that case the State intervened as an actor and its intervention was such that it could be treated substantially as a plaintiff and the jurisdiction sustained on the ground that a State may sue an individual in a federal court. Although in the more recent case of *Gunter* v. *Atlantic Coast Line,*[6] Mr. Justice White, delivering the opinion of the court, declared it to be an elementary proposition that a State could waive its immunity, it will be observed that in that case the suit was in fact against an officer of the State of South Carolina and that the State itself was not a party to the record. It seems to me, with all deference, that the court has not yet squarely passed upon the point, nor, so far as I know, has

[5] 108 U. S. 436, 447. [6] 200 U. S. 273, 283, 284.

it ever questioned the fundamental principle that a federal court cannot exercise jurisdiction in any case to which the judicial power of the United States, as delegated and defined in the Constitution, does not extend. An entirely different question is presented when we consider whether an officer of a State can consent or be authorized to consent to be sued in a federal court; in other words, whether he can waive the defense that the State is a necessary party. It does not follow that, because a State cannot be sued, it may not authorize its agent to defend without pleading the absence of the real party in interest, and the denial of jurisdiction over the State as principal does not necessarily imply a denial of jurisdiction over the officer when doing or attempting to do an illegal act as its agent or representative. So, also, a different question is presented under the later amendments, which may be held to have qualified the Eleventh Amendment in authorizing Congress to enforce their provisions by appropriate legislation.

In construing the Eleventh Amendment for the purpose of ascertaining its true intent and meaning, as indeed in construing most of the provisions of the Constitution and its contemporaneous amendments, reference to the history and common law of England is generally the safest guide as to what was understood and intended at the time. In that history will be found the true sources of our institutions, for they are essentially and predominantly English. The legal and political institutions of England were constantly in the minds of the framers and of the people. The common law had long been regarded with affection and reverence as the birthright of Americans and the guardian at once of their private rights and public liberties. Indeed, the Continental Congress, assembled in October, 1774, had declared the colonies entitled as of right to the common law.

The theory of the immunity of a State or of the United States from suit by an individual without its consent is frequently asserted to be analogous to the monarchical principle as to the immunity of the king from suit without his consent commonly expressed in the maxim that "the king can do no wrong." The idea seems to have been that in England it would be considered an invasion of the sovereignty of the crown and derogatory to its dignity to subject the king to a suit by an individual except with his consent, to be granted or refused in his arbitrary discretion. It is very doubtful whether any such idea finds support in the common law or history of England and the tradi-

tional usage and experience of that country, at least to the extent often insisted upon.

On the contrary, it had long been regarded in England as settled law that the subject was entitled to an effective legal remedy for any invasion of his legal rights by the king or the government. He had a right to sue the king for the restitution of property or money or the recovery of damages for breach of contract, and to sue officers of the crown for any tortious acts. The practice established for centuries had been to present to the king a petition praying leave to sue him, and the custom was for the king as of course to endorse on the petition his fiat that right be done. Thereafter the action proceeded as any other action between subject and subject. This right was conceded to aliens as well as to subjects. Although the leave to sue was nominally or theoretically granted as a matter of grace and not upon compulsion, it was in fact the constitutional duty of the king to grant it, and it was seldom denied. Under the common law, the subject was entitled as matter of right—as one of the immemorial liberties of Englishmen—to inform his king of the nature of any grievance, and thereupon, in the language of Blackstone, "as the law presumes that to know of any injury and to redress it are inseparable in the royal breast, it then issues, as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved."

The nature of the proceeding under a petition of right has been passed upon by the Supreme Court of the United States in several cases, and its decisions clearly show that the remedy is not to be regarded as a mere matter of grace, but as a right to sue and obtain redress in the class of cases to which it applies. Thus, Chief Justice Marshall, delivering the opinion of the court in *Marbury* v. *Madison*[7] at the February term, 1803, said: "In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court." In *United States* v. *O'Keefe*[8] the court at the December term, 1870, examined the nature of the remedy in construing the act of Congress of July 27, 1868, now section 1068 of the U. S. Revised Statutes. Mr. Justice Davis, speaking for the court, said: "This valuable privilege, secured to the subject in the time of Edward the First, is now crystallized in the common law of England.

[7] 1 Cranch 137, 162. [8] 11 Wall. 178, 183.

As the prayer of the petition is grantable *ex debito justitiae*, it is called a petition of right, and is a judicial proceeding, to be tried like suits between subject and subject. * * * It is of no consequence that, theoretically speaking, the permission of the crown is necessary to the filing of the petition, because it is the duty of the king to grant it, and the right of the subject to demand it. And we find that it is never refused, except in very extraordinary cases, and this proves nothing against the existence of the right. * * * If the mode of proceeding to enforce it be formal and ceremonious, it is nevertheless a practical and efficient remedy for the invasion by the sovereign power of individual rights." And in the case of *Carlisle* v. *United States*[9] the court held that under the proceeding known as the petition of right the government of Great Britain accorded "the right to prosecute claims against such government in its courts" not only to subjects but to aliens. Later still in the famous case of *United States* v. *Lee*,[10] which was an action at law to recover the property known as the Arlington National Cemetery from the possession of officers of the United States government, Mr. Justice Miller, delivering the opinion of the court, said: "It is believed that this petition of right, as it has been practised and observed in the administration of justice in England, has been as efficient in securing the rights of suitors against the crown in all cases appropriate to judicial proceedings, as that which the law affords to the subjects of the king in legal controversies among themselves."

The remedy under the petition of right has continued unimpaired to the present time. The procedure is now regulated by the statute 23 and 24 Victoria, ch. 34, passed July 3, 1860. The statute provides that the king by means of this proceeding may be sued at law or in equity as the particular case may require, and that the remedy afforded "shall comprehend every species of relief claimed or prayed for in any such petition of right, whether a restitution of any incorporeal right, or a return of lands or chattels, or a payment of money or damages, or otherwise." In granting or refusing the petition, the king acts under the advice of the home secretary, and the latter is responsible to Parliament in case he shall arbitrarily or wrongfully advise a refusal.

The petition of right, however, is available only in cases seek-

[9] 16 Wall. 147, 156. [10] 106 U. S. 196, 205.

ing to obtain restitution of lands or goods, or, if restitution cannot be given, compensation in money, or where the claim arises out of a contract, as for goods supplied to the crown or to the public service. It does not extend to cases of torts. If the king personally should commit or threaten to commit a tort, such, for example, as a trespass, he cannot be proceeded against in either a civil or criminal court, and the ordinary law courts have no means of restraining or punishing him personally or affording redress against him for any wrong done by him personally. Not only does the maxim that "the king can do no wrong" prevent any ordinary court from granting relief against the king himself, but the courts have no jurisdiction against him in cases of tort.

Nevertheless, this ancient and fundamental maxim never meant that the king was above the law or could violate the law with impunity, nor was it ever understood in any such sense as that everything done by the king was to be regarded as just and lawful. On the contrary, it was fearlessly proclaimed in the days of Bracton that the king was below the law and bound to obey it, and in his coronation oath he swears to observe and respect it.

But whatever might have been the personal immunity of the king, it had been settled at common law long prior to the adoption of the Constitution that such immunity did not extend to any officer or servant of the crown. The very exemption of the king from responsibility before the courts in cases of torts conclusively established the personal responsibility of some officer or servant of the crown, and the direction or authority of the king did not constitute any warrant or defense for a wrongful and illegal act done by any such officer or servant.

As the Supreme Court said in the case of *Langford* v. *United States*[11]: "The English maxim does not declare that the government, or those who administer it, can do no wrong; for it is a part of the principle itself that wrong may be done by the governing power, for which the ministry, for the time being, is held responsible." The boast of Englishmen for centuries had been that no officer of the government was above the ordinary law. Professor Dicey says in his interesting lectures at Oxford as a successor of Blackstone in the Vinerian Professorship: "In England the idea of legal equality, or of the universal subjection of all classes, to one law administered by the ordinary courts, has been pushed to its utmost limit. With us

[11] 101 U. S. 341, 343.

every official, from the prime minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character, but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person." And Anson in his Law and Custom of the Constitution points out that the English constitution "has never recognized any distinction between those citizens who are and those who are not officers of the state in respect of the law which governs their conduct or the jurisdiction which deals with them." In the famous case of *Entick* v. *Carrington*,[12] a secretary of state sought immunity as an officer of the crown from a suit for damages by pleading reasons of state for an unlawful act, but Lord Chief Justice Camden declared that "with respect to the argument of state necessity or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions." And one hundred years later, in the case of *Feather* v. *The Queen*,[13] 1865, Lord Chief Justice Cockburn declared that "no authority is needed to establish that a servant of the crown is responsible in law for a tortious act done to a fellow subject, though done by the authority of the crown, a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the crown on the one hand, and the rights and liberties of the subject on the other."

Moreover, the rule of *respondeat superior* does not apply to the king. The conclusive legal presumption is that the king can do no legal wrong, and this leads to the further conclusive presumption that, in the eye of the law, he cannot authorize or direct a wrong. Every executive officer of the crown is, therefore, treated as if he were a principal, and as such is held personally responsible whenever any legal right of the subject has been invaded by him, although he may have acted under the direct order of the king and

[12] (1765) reported by Hargrave in 19 State Trials, 1030, 1073.
[13] 6 B. & S. Q. B. 257, 297.

even in his presence. The civil irresponsibility of the king for tortious acts could not have been maintained with any show of justice if the officers and agents of the crown had not been held personally responsible for any illegal acts committed by them and if the king had not been compelled to act through responsible agents. From the earliest times, it has been deemed essential that the king should always act through an officer or servant, in order that there might be some one upon whom responsibility could be fastened. Lord Coke declares in his Institutes that "the king, being a body politique, cannot command but by matter of record." Custom and statute early required that all executive acts to which the sovereign was of necessity a party should be done in certain forms and authenticated by the signature or seal of some officer. The intervention of an officer is always necessary. In fact, some minister or officer of the crown can be held fully responsible for any illegal act. Anson states "that there is hardly anything which the sovereign can do without the intervention of written forms and nothing for which a minister is not responsible."

Although the cases in England against officers of the crown were generally at law, there can be no reasonable doubt that the Court of Chancery, at the time the Constitution was adopted, had full power, by means of the writ of injunction, to restrain an officer of the crown from violating the law where the remedy at law in a suit for damages or for possession of property, real or personal, would have been wholly inadequate and ineffective. The great state trial known as the *Case of the Bankers,* in which Lord Somers was overruled by the House of Lords, left no doubt as to the principle and the jurisdiction of the courts in suits against crown officers. As Professor Goodnow has shown in his able and interesting work on Comparative Administrative Law, the English courts had long been accustomed in one way or another to control servants of the crown and executive officers of the government and to compel them to obey the law. All the great writs, which were at first prerogative writs, had been originally issued to control administrative or judicial officers. Such was the function of mandamus, habeas corpus, quo warranto, prohibition. Injunctions, it is true, seem rarely to have been made use of in England as a means of preventing administrative action, and only a few cases can be found where it was so used, but, on settled principles, any administrative or executive officer threatening to do an illegal act which would injure the individual in his property

rights, was amenable to the jurisdiction of courts of equity in controversies requiring its intervention.

It is also true that no cases are to be found in England where officers have been held responsible in damages for enforcing an act of Parliament or have been restrained from carrying its provisions into effect. This, of course, is the result of the legislative sovereignty of Parliament and of the fact that there are no constitutional limitations imposed upon it. Nevertheless, the same principles which make government officers in England subject to the ordinary law and the ordinary courts for any illegal act done or threatened would clearly authorize the issue of injunctions restraining the enforcement of an unconstitutional statute if there were any constitutional limitations upon the legislative power of the English Parliament. Thus, for example, a colonial statute, or a municipal or administrative rule, by-law or ordinance in conflict with an act of Parliament would be illegal and void, and, within settled principles, its enforcement could be restrained if other grounds of equity jurisdiction existed.

In the light of the long-settled and well-known rules of the common law, establishing the distinction between suits against the king under the petition of right and suits against officers of the crown for violating the legal rights of individuals, it is most significant and persuasive, if not convincing, that the framers of the Eleventh Amendment confined its language to suits directly against a State, and did not attempt to prohibit suits against officers of a State when acting as its representatives. They could hardly have intended that such a principle as that "the king can do no wrong" should have any place in our system of government to the prejudice of the constitutional rights of the individual. "We have no king to whom it can be applied." They surely did not intend to afford less protection and less redress against the invasion of the rights of citizens by those in power than was afforded in monarchical England to the subjects of the king. They could not have been ignorant of the famous cases which had established the legal responsibility of all officers of the English government and their subordination to the jurisdiction of the ordinary courts of justice. They clearly contemplated that state statutes might be passed in conflict with the Constitution of the United States and that these statutes would necessarily have to be enforced or attempted to be enforced by state officers. They must have appreciated that if state officers, as agents of their respective States, were

granted immunity from suit in a court of the United States because they were acting for and on behalf of their States, the Constitution could in many respects be rendered ineffective and nugatory. The failure to prohibit suits against officers of a State must, therefore, have been intentional. It is highly improbable that any one at the time conceived that the language adopted was broad enough to prohibit suits against officers of a State. On the contrary, it is proper to assume that the framers of the Eleventh Amendment did not intend to permit an officer of a State, while acting under the color or excuse of an unconstitutional state statute, to invade or deny any right guaranteed by the Constitution of the United States and be immune from suit in a court of the United States merely because he was acting in a representative capacity as an agent of the State. The courts of the United States were specially charged with the preservation of the Constitution, so far, indeed, as it can be preserved by judicial authority. The Federalist shows how clearly it was contemplated that the federal courts were to have power to overrule state statutes in manifest contravention of the Constitution. If state officers were withdrawn from the jurisdiction of the national courts, their oath to support the Constitution of the United States might become a mere empty ceremony of no enforceable obligation or sanction. If officers of a State could not be sued in equity in a federal court to enjoin the enforcement of unconstitutional state statutes, many of the provisions of the Constitution, of equal authority with the Eleventh Amendment, might not be effectually enforceable except by the grace of the States. The prohibitions against the States, which existed when the Eleventh Amendment was adopted, such as that no State shall emit bills of credit, or make anything but gold and silver coin a tender in payment of debts, or pass any bill of attainder, or any *ex post facto* law, or any law impairing the obligation of contracts, or lay imposts or duties on imports or exports, might to a great extent be nullified and rendered practically ineffective, if officers of a State could not be sued in a federal court. Indeed, the thirteenth, fourteenth and fifteenth amendments would be deprived of a great part of their intended effect if state officers enforcing unconstitutional state laws and clothed with the power of the State could not be sued in a federal court. As each of these subsequent amendments, however, provides that "Congress shall have power to enforce this article by appropriate legislation," it has been suggested that this provision may be construed as limiting the prohibition of the Elev-

enth Amendment and empowering Congress to confer on the courts of the United States jurisdiction of suits against States or state officers as an appropriate means of enforcing the later amendments. Mr. Justice Shiras referred to this view in the case of *Prout* v. *Starr*[14] and said: "Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutory provisions of the Fourteenth Amendment have been disregarded by state enactments."

The courts of the United States and of the several States have generally adopted and applied the English common law as to the amenability of executive and administrative officers to the jurisdiction of the ordinary courts and their personal responsibility for any illegal acts done by them or under their direction. There is no longer any question but that the Eleventh Amendment does not shield state officers from suits at law in a court of the United States to recover damages for any invasion of private rights under the color of an unconstitutional statute, or to recover possession of real property in the custody of such officers. The rule is axiomatic that no officer in this country is so high that he is above the Constitution of the United States, and that no officer of the law, state or national, may violate it under the color or excuse of a statute, national or state, in conflict with its provisions. The fact that an officer has acted on behalf of a State under the direction or authority of an unconstitutional statute or under the orders of a superior constitutes no defense to an action for restitution or for damages for any invasion of individual rights any more than the command of the king or the prime minister would constitute a defense in England. The alleged law is treated as a nullity and absolutely void for all purposes, except perhaps as negativing the existence of malice or bad faith or criminal intent. But it confers no warrant or authority and affords no protection.

The fundamental reasoning upon which these conclusions are based is that the State, the abstract political entity, can speak and act only by valid laws, that an unconstitutional statute cannot be its legal act, that it cannot, legally speaking, authorize any act in conflict with the Constitution, that no officer of a State, not even the Governor, can have any legal duty or executive function to disregard or violate the Constitution, and that whatever wrong is attempted in its name is to be conclusively imputed to its officer, who cannot plead his representative capacity. The

[14] 188 U. S. 537, 543.

distinction between the government of a State and the State itself is elucidated by Mr. Justice Matthews in the leading case of *Poindexter* v. *Greenhow*.[15]

More difficult, however, are questions which arise in connection with suits in equity to restrain state officers from enforcing state statutes alleged to be unconstitutional. The plainest principles of justice would seem in many cases to require a preventive remedy, for it might be of vital importance that an officer be restrained from doing an unlawful act to the irreparable injury of the individual. Manifestly, it would be unfair and unjust to tell the latter that he must wait until his rights have been violated or his property confiscated or destroyed. This point was first presented to the Supreme Court in 1824 in the case of *Osborn* v. *Bank of the United States*.[16] It was then declared, in one of Chief Justice Marshall's famous opinions, that notwithstanding the Eleventh Amendment, a circuit court of the United States had jurisdiction in equity to restrain a state officer from executing or enforcing an unconstitutional state statute when to execute it would violate rights and privileges of a complainant guaranteed by the Constitution of the United States, and work irreparable damage and injury to him, for which no plain, adequate or complete remedy could be had at law.

The general doctrine of the *Osborn* case has never been departed from, and it has sustained numerous suits which have protected property rights from the enforcement of state statutes in conflict with the Constitution of the United States. It is no exaggeration to say that this doctrine has more than any other rendered the Constitution an effective shield against oppressive, tyrannical and confiscatory legislation and compelled the States to obey the supreme law of the Constitution. The reasoning of Chief Justice Marshall is very logical and lucid, and it is most convincing. If, as was then conceded as indisputable, the privilege or immunity of the State as principal was not communicated to the officer as agent, and if an action at law would lie against the officer in which full compensation ought to be made for a legal injury resulting from any unlawful act done in pursuance of an unconstitutional and void statute, there existed no reason why the preventive power of a court of equity should not equally apply to such an officer or why it should not restrain him from the commission of a wrong which it would punish him for committing. "If," continues the Chief Jus-

[15] 114 U. S. 270, 290. [16] 9 Wheat. 738.

tice, "the party before the court would be responsible for the whole injury, why may he not be restrained from its commission, if no other party can be brought before the court?" It is pointed out that the very fact that the State could not be sued was a reason for permitting the suit to proceed in its absence against the officer or agent. Thus, we have another example of how, in the evolution of legal principles, the same causes produce the same results. As in England the fact that the king cannot be sued in the ordinary courts for a wrong leads to the rule that his immunity or irresponsibility is not to be extended to his servants or agents and that the latter are to be held personally liable for whatever they do under the king's orders in violation of the legal rights of an individual, so with us the fact that the State cannot be sued in a federal court leads to the rule that its immunity or irresponsibility is not to be extended to its officers and that they are suable as responsible principals, even when acting under a state statute and as its agents or representatives.

Chief Justice Marshall also said in the *Osborn* case that the court thought it might "be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently the 11th amendment, which restrains the jurisdiction granted by the Constitution over suits against states, is, of necessity, limited to those suits in which a state is a party on the record. The amendment has its full effect, if the constitution be construed as it would have been construed had the jurisdiction of the court never been extended to suits brought against a State, by the citizens of another State, or by aliens. The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties." This reasoning was reaffirmed by the Supreme Court as late as 1872 in the case of *Davis* v. *Gray*,[17] which was a suit against the governor of the State of Texas. But, it has since been repudiated in later cases, and the court has declared that "it must be regarded as a settled doctrine of this court, established by its recent decisions, that the question whether a suit is within the prohibition of the Eleventh Amendment is not always to be determined by reference to the nominal parties on the record."[18]

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[17] 16 Wall. 203, 220. [18] In re Ayers, 123 U. S. 443, 487.

It may, nevertheless, be interesting to re-examine the doctrine enunciated by Chief Justice Marshall and to inqure whether, after all, it does not embody the true and sound rule which should govern this question, particularly in view of the fact that the cases which have departed from his reasoning have failed to indicate any definite criterion to guide us in determining when a suit against a state officer is or is not to be deemed a suit against the State within the true meaning of the Eleventh Amendment. The question should be considered as if the jurisdiction of the federal courts had never been extended to suits by an individual against a State. The controlling inquiry in a suit against a state officer ought logically to be whether the relief or remedy sought can be granted in the absence of the State as a party defendant; in other words, whether it is or is not a necessary and indispensable party, to be determined by the result or burden of the judgment which may be entered. If, for example, the suit is to enjoin the enforcement of an unconstitutional statute regulating rates or imposing taxes, it must be presumed that the State has not authorized the wrong, that it can have no legal concern or interest in a void enactment of its legislature, and that it cannot be heard to assert any right to have its officers violate the Constitution of the United States for its benefit. If, on the other hand, the relief or remedy sought will affect the property rights or funds of the State, or compel it to pay its debts, or require the specific performance of a contract by the State, or the doing or omitting to do any act by the State, the court must needs hold that it is a necessary and indispensable party, and that, as it cannot be sued in a federal court for want of jurisdiction over it, the suit must be dismissed. This dismissal, however, would not be for want of jurisdiction or judicial power over the individual state officer as defendant, nor because the suit was against the State—for the State was not a party and its presence was sought to be dispensed with—but because the State was an indispensable party defendant and the suit could not proceed in its absence. The result of recurring to this view would be to simplify the consideration of many cases and reconcile much conflicting reasoning. We would then have a definite and logical criterion to guide us in cases against state officers. If the court found that the State was not a necessary and indispensable party, the issue in such cases would be narrowed to the inquiry whether the relief should be granted within established principles of equity jurisprudence and procedure.

The Supreme Court has held that notwithstanding the general

principle that a court of equity has no jurisdiction of a bill to stay criminal proceedings, nevertheless it may enjoin a state officer from instituting such proceedings where property rights are about to be invaded and destroyed through the instrumentality of an unconstitutional statute providing for its enforcement by criminal proceedings. The jurisdiction of a court of equity ought not to be ousted simply because the State has authorized its officers to enforce unconstitutional regulations affecting property rights by a criminal instead of a civil action. The nature of an essentially civil question or controversy, such as one between shippers or passengers on the one side and a railroad company on the other, as to the reasonableness of rates, cannot be changed by legislative fiat. The exercise of such a jurisdiction to restrain criminal proceedings has been found necessary in many recent cases where a defense on a criminal trial before a jury would afford no fair or adequate protection to those whose property rights were affected. The litigation, for example, under a bill in equity to restrain the enforcement of an unconstitutional criminal statute regulating rates presents a controversy of a civil nature with the officer and not with the State, and the only question is whether a court of equity should intervene or leave those against whom criminal proceedings are threatened to their defense by demurrer to the indictment or trial on the merits. The latter will always be done when a defense at law will afford reasonably fair and adequate protection. But when a defense at law will not afford due protection, and irreparable injury to property is threatened, there exists no reason why a court of equity should not intervene and grant protection and relief.

It may seem to many doubtful whether the two leading cases which are now attracting so much attention, namely, *In re Ayers* [19] and *Fitts* v. *McGhee* [20], necessarily presented any question under the Eleventh Amendment, and whether they should not have been disposed of solely upon the ground that a court of equity ought not to have enjoined the threatened suits or prosecutions. Neither of the suits in equity discussed in these two cases would probably have been maintainable under the general principles of equity jurisprudence even if a State had been suable in a court of the United States, for no irreparable injury was threatened, and the opportunity of defense at law seemed to afford reasonable protection.

The question of the right to sue a state officer to restrain the

[19] 123 U. S. 443. [20] 172 U. S. 516.

enforcement of an unconstitutional statute regulating the rates and charges of railroad companies is now pending in some of its aspects before the Supreme Court in important cases involving statutes of Minnesota and North Carolina. These cases have been fully and ably argued and are under advisement, and they may lead to a reconsideration of some of the reasoning in the prior cases. A comprehensive decision may, therefore, shortly be delivered which shall remove some of the reasons for the existing misunderstanding, prejudice and conflict between the state and federal courts.

The time at our disposal renders it impossible to consider the many great and interesting cases which have arisen under the Eleventh Amendment and which frequently carry us into the realm of public law and statesmanship. The leading decisions are, of course, in the Supreme Court, but many instructive opinions will be found in the lower federal courts. The constant increase of governmental functions and of interference with individual liberty and action is certain to be a fruitful source of litigation in the future and to call for frequent consideration of the scope of the Eleventh Amendment.

In discussing the subject of suits to restrain the enforcement of state statutes alleged to be unconstitutional, we should not overlook or pass unnoticed the attempts made in recent enactments regulating rates to coerce or intimidate railroad and other public service corporations into immediate obedience and abandonment of their constitutional right to appeal to the courts, by imposing upon them enormous and unreasonable fines and penalties, or by threatening them with the forfeiture of the protection of the government. Heavy fines or penalties are attached to each violation of the law; and as the transactions of these corporations are generally very numerous, disobedience of the statute, if only in good faith for the purpose of testing its validity, would in a few days involve the risk of bankruptcy. The avowed or ill-concealed purpose of these fines and penalties and of the resort to the criminal law is to prevent any interference by courts of equity. The idea, advanced in many quarters and under many disguises, seems to be that corporations shall be outlawed unless they consent to abandon their right to appeal to the courts for protection against unconstitutional statutes and void and oppressive enactments. This spirit is quite widespread. For example, while the federal employers' liability act, recently declared uncon-

stitutional by the Supreme Court of the United States, was under advisement by that court, the President in his Jamestown speech criticised the railroad companies for having contested the validity of the statute and suggested that "the law should be such that it will be impossible for the railroads successfully to fight it without thereby forfeiting all right to the protection of the Federal Government under any circumstances."

The courts have repeatedly pointed out that the owners of property devoted to a public use are entitled to a fair and adequate judicial investigation if they contend that the rates or charges prescribed by a legislature are unreasonable and confiscatory. This is but recognizing that the owners of railroads and other properties are entitled to a day in court, just as the humblest person is entitled to his day in court when his constitutional and vested property rights are invaded by the government. If the private property of the individual be taken for a public use, it would, of course, be obviously unfair and unjust to permit the legislature to say conclusively what should be paid to him and deny any adequate remedy in the courts to review the legislative fiat. The same principle applies to public service corporations. They are entitled to appeal to the courts to pass upon the validity of any legislation which attempts to compel them to render services at a rate fixed by the legislature if they contend that such rate is unreasonably low and confiscatory; and pending the judicial investigation, they ought not to incur the risk of accumulating penalties. The New York Public Utilities Act of last year recognizes this in principle. But instead of granting a hearing or providing for any judicial proceeding in which the reasonableness of the statutory rates may be promptly investigated, the constant effort seems to be to render resort to the courts so dangerous that property owners will abandon their right to a day in court rather than take the risks involved in allowing penalties to accrue and accumulate, which might subject their property to confiscation. Thus, in the recent New York gas statute, declared unconstitutional by the United States circuit court, no judicial investigation was afforded and the penalties imposed were at the rate of $1,000 for each overcharge or violation of the law. As the Consolidated Gas Company alone had upwards of 390,000 customers, an overcharge on only one month's bills, pending an attempt to test the law in good faith, would involve the fabulous total of $390,000,000 in penalties, or nearly five times the value of

the whole property of the company! In fact, if the New York statute, at least in this respect, is not nullified by the Supreme Court on the pending appeal, the Consolidated Gas Company may be absolutely ruined for having asserted its legal right to a fair judicial investigation before being compelled to accept what it insisted (and what the court has so far held) was a confiscatory and unreasonable rate; that is to say, for daring to insist on its day in court. The Kansas statute regulating stockyards which was declared unconstitutional by the Supreme Court, imposed penalties which might have aggregated $15,000,000 in one day, or nearly twice the value of all the property of the Stockyards Company. The recent railroad statute in North Carolina imposes fines which would amount to $2,500,000 per day, and in a few days would bankrupt the railroad companies. The Minnesota railroad statute imposes penalties which in one month might aggregate several hundred million dollars!

Speaking of these penalties, United States Circuit Judge Lochren justly said: "There is no question but that such legislation is vicious, almost a disgrace to the civilization of the age, and a reproach upon the intelligence and sense of justice of any legislature which could enact provisions of that kind."

If any such policy of coercion and intimidation can possibly be enforced by the state or national governments, in any form or under any subterfuge whatever, we shall no longer be living under a constitutional government with effective guaranties of individual rights and liberties. If Congress or a state legislature can compel any class to submit to an unconstitutional statute by imposing ruinous fines and penalties, or other provisions intended to operate *in terrorem,* or by threatening to deprive them of the protection of the government, then the constitutional limitations imposed by the people can be readily circumvented and nullified, and our supposed rights and liberties will exist only in the grace or self-restraint of legislatures. One class is selected to-day, but another class will be selected to-morrow, depending only on the interest or prejudice or temptation or caprice of the temporary majority. Such an exercise of arbitrary and irresponsible power is in utter conflict with the whole theory of our institutions and in utter disregard and defiance of those fundamental and immutable principles of justice under which alone can free governments exist or endure. As Chief Justice Marshall said in the famous case of *Marbury* v. *Madison*—and the court was then facing a hostile

Executive, a hostile Congress and a hostile public opinion—"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. . . . The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

Some of the bills now pending before Congress propose to deprive the federal courts of the power to issue preliminary injunctions in these cases. This would be a policy fraught with immeasurable danger to property interests as well as to personal liberty. It would frequently amount to a complete denial of justice. Ruin might readily attend the delay of litigation. But, undoubtedly, some reform is called for. There can be no question but that preliminary injunctions against the enforcement of state statutes regulating public service corporations should never be granted without prior notice to the representatives of the people and full opportunity to be heard and then only upon the clearest showing of threatened irreparable injury pending the delay of a full hearing on the merits. Such cases ought not only to be given the earliest possible hearing, but the courts should insist that both sides proceed with the utmost expedition in the taking of testimony. A hearing in open court and not before a master would greatly facilitate this result. The people are entitled to a speedy determination of the questions involved in order that they may promptly have the benefit of the statute if it be constitutional or that they may at once amend it if it be unconstitutional. There is no reason why in the majority of cases such a suit should not be ready for final hearing and actually heard within sixty days or why it should not be finally disposed of in the appellate courts within less than a year. It should have preference on all calendars. The expedition act of Congress, applicable to cases arising under the anti-trust and interstate commerce laws, would furnish a good model for cases involving the validity of state laws. The conditions which now confront the people in many States, where statutes regulating public service corporations are often tied up for years by litigation, tend to create discontent, impatience and dissatisfaction with the courts and to engender a desire for revolutionary change from an intolerable situation. Laws

regulating public utilities are often essential for protection against those who otherwise would have the power of making a prey of the necessities of the people, and it is simply disgraceful that the enforcement of such laws can be delayed by litigation for years after their enactment. As the delays in our criminal procedure are crying for remedy, so the delays in this class of litigation are equally crying for immediate and effective relief. It is of paramount importance that the people should be convinced that they can procure in the courts, and especially in the federal courts, a prompt determination of all litigation affecting the validity of legislation regulating public service corporations which they or their representatives have deemed necessary for their protection against extortion or oppression.

But, above all other considerations, stands the necessity for maintaining the absolute confidence of the people at large in the wisdom and impartiality of the federal judges, who are so often called upon to determine the validity of state statutes alleged to conflict with the Constitution of the United States and in so doing to administer justice as between the State and the individual, as between the majority and the minority. It must surely be a matter of profound concern to us as lawyers that all laymen should appreciate that the exercise of this jurisdiction by the federal courts is necessary for the preservation and perpetuation of the Constitution, and that it is right and just that every citizen should have the privilege of appealing to the national courts for the protection of rights and liberties guaranteed to him by the national Constitution. Equally important is it that the people should appreciate that in entertaining suits to restrain the enforcement of state laws alleged to be unconstitutional, the federal judges are only performing their duty according to their oath of office, which in the noble language prescribed in 1789 pledges them "to administer justice without respect to persons," to "do equal right to the poor and to the rich," and to "faithfully and impartially discharge and perform" their duty "agreeably to the Constitution and laws of the United States." An examination of the cases in which injunctions have been granted against the enforcement of state laws must satisfy any candid mind that in the great majority of cases the power has been impartially exercised, with tact, discretion and prudence, and that such injunctions have only been granted when property rights seemed to be threatened with

irreparable injury. It would be too much to expect infallibility in all these cases, but errors are corrected on appeal.

Assaults upon our judiciary and unwarranted and unjust criticism of our judges undermine the people's trust in the courts and threaten the whole structure of our civilization. The United States judges are justly sensitive to public opinion and distressed by unjust and ignorant criticism. They know how important it is that they should retain public confidence. They realize, as their opinions constantly show, that "next to doing right, the great object in the administration of public justice should be to give public satisfaction." But they cannot sacrifice truth to popularity, the Constitution to present expediency. Those who assail the federal judges should bear in mind that the founders in their wisdom constituted the judicial power our bulwark against unadvised, hasty and tyrannical action on the part of those in power and our shield from "those sudden and strong passions to which we are exposed," and which, if unchecked and unrestrained, may lead to ruin. However unpopular and disagreeable the task may be of setting aside an act of Congress or of a state legislature, however painful it must be to any just man to become the subject of calumny, a federal judge has no choice, no discretion, no will of his own, but must hear and decide according to his conscience every case submitted to him within the jurisdiction of his court as conferred and imposed by the Constitution and laws of the United States. Let us always bear in mind the lofty words of the great Chief Justice in the case of *Aaron Burr,* his decision in which excited so much public prejudice and clamor one hundred years ago, when, speaking of the duty of a judge, he said: "If he has no choice in the case; if there is no alternative presented to him but a dereliction of duty, or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace."

WILLIAM D. GUTHRIE.

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NOTES.

THE RIGHTS OF THE HEIR OF A DECEASED PARTNER IN FIRM REALTY.—It is fundamental that no partner has title to any specific personalty, his interest therein being merely an equity to share in the final residual proceeds. *Bank* v. *Carrollton R. R.* (1870) 11 Wall 624. The legal title to the firm realty, on the other hand, because of technical rules of seisin, *Percifull* v. *Platt* (1880) 36 Ark. 456, must vest in some member (or members); but Equity treats the holder as trustee, *Dupuy* v. *Leavenworth* (1861) 17 Cal. 263, without beneficial rights in any particular parcel. *Meily* v. *Wood* (1872) 71 Pa. 488. In England an intention that all assets shall be turned into cash upon dissolution is presumed. *Darby* v. *Darby* (1856) 3 Drew. 495. Accordingly, through the doctrine of conversion the realty when acquired is regarded in Equity as personalty, both as between the partners, cf. *Essex* v. *Essex* (1855) 20 Beav. 442, thereby excluding dower, cf. *In re Music Hall Block* (1885) 8 Ont. Rep. 225, and as between the real and personal representatives of a deceased partner,

Attorney-General v. *Hubbuck* (1884) 13 Q. B. Div. 275, unless a contrary intention appears. *In re Wilson* (1893) 2 Ch. 340 (semble); Partn. Act (1890) § 22. In America this presumption of intention is rejected, *Shearer* v. *Shearer* (1867) 98 Mass. 107, and a specific division of the realty may be decreed. *Molineaux* v. *Reynolds* (1896) 54 N. J. Eq. 559. The English result is here reached only under special circumstances: e. g., where there are express provisions for sale, *Maddock* v. *Astbury* (1880) 32 N. J. Eq. 181, or when the sole partnership object is land speculation. *Buckley* v. *Doig* (1907) 188 N. Y. 238. But except in such cases almost no American jurisdiction bars the heir altogether. His exact status, however, is involved in confusion. Much of this obscurity is due to needless use of the language of conversion. It is commonly stated that the realty is converted into personalty so far as necessary to satisfy firm creditors and to adjust advances by partners. *Rovelsky* v. *Brown* (1890) 92 Ala. 522, 525. But the realty is liable not because it is regarded as personalty, but because it is firm property. Parsons, Princ. Partn. (2nd Ed.) § 114. The cases in group 2, *post,* might be explained simply on the theory of implied trusts. *Shearer* v. *Shearer, supra.* Strictly, conversion can only concern those whose rights are affected by the legal nature of the property, i. e., a deceased partner's representatives and widow. Lindley, Partn. (7th Ed.) 383; see *Woodward-Holmes Co.* v. *Nudd* (1894) 58 Minn. 236. The numerous cases establish clearly but two results, though without adequate development of the reasons: first, any surplus of realty *in specie* after adjustment of firm obligations goes to the heir, *Foster's Appeal* (1873) 74 Pa. 391; *Buchan* v. *Sumner* (N. Y. 1847) 2 Barb. Ch. 165, 201, subject to dower; *Lenow* v. *Fones* (1886) 48 Ark. 557; second, if the realty must be sold to meet firm obligations, Equity will compel the heir to convey whatever legal title vested in him. *Burnside* v. *Merrick* (Mass. 1842) 4 Met. 537; *Shanks* v. *Klein* (1881) 104 U. S. 18. The precise nature of the heir's rights between the ancestor's death and the distribution point is left undetermined.

Since a partner's share is strictly a right merely in the ultimate balance of the firm property, whatever its form, cf. *Clagett* v. *Kilbourne* (U. S. 1861) 1 Black. 346, the moment determinative of the shares of living partners is the distribution point. Dissolution of the firm by the death of a member introduces the derivative, conflicting rights of either class of the decedent's representatives, and also a second controlling point of time, the instant of death. The English doctrine meets this situation logically, for at the partner's death the right ordinarily is a right to cash on final accounting, Lindley, Partn. (7th Ed.) 377, or, if a contrary intention appears, a right in realty then owned. If the American doctrine differed from the English only in that the presumption of intention was reversed, it would be equally logical. Dicta to the effect that the surviving partner must exhaust the personalty in payment of debts before recourse to the realty, *Stroud* v. *Stroud* (N. C. 1868) Phil. L. R. 525, 526; *Easton* v. *Courtwright* (1884) 84 Mo. 27, 39, *Walling* v. *Burgess* (1889) 122 Ind. 299, 305, and decisions giving the heir the surplus proceeds of the necessary sale of indivisible realty, *Walling* v. *Burgess, supra,* seem to indicate that the heir's rights are in this country also fixed as of the

date of the partner's death, though not ascertained until the distribution point. But the *in specie* rule, group 1, *supra,* is either non-committal, because enunciated where the realty was owned during the life of the firm, *Haeberley's Appeal* (1899) 191 Pa. 239, or it determines the heir's rights by the fortuitous condition of assets at the distribution point, as where personalty is exchanged for realty by the surviving partner during the winding-up process. *Coolidge* v. *Burke* (1901) 69 Ark. 237. It is submitted that the measure of the heir's rights should be the land existing *in specie* at the time of the partner's death, or if sold, the proceeds remaining after payment of firm debts, plus the value of personalty which might properly have been used. This rule logically fixes the heir's rights as of the date of the ancestor's death, without necessarily negativing power in the surviving partner to sell the land, though the personal assets exceed liabilities. It might be argued that such power should exist in certain cases, as where a sale of realty would serve to swell the totality of assets, or an immediate liquidation of personalty would be ruinous, see *Rossum* v. *Sinker* (Ind. 1880) 12 Cent. L. J. 202, inasmuch as a partnership is primarily an association for profit. That the courts would go so far is doubtful, and it would seem that such sales should be at least on order of court. Support for the main rule suggested is found in dower cases. A widow has dower in the land left over *in specie, supra,* or if this be sold, to an equivalent in the surplus proceeds. *Mowry* v. *Bradley* (1876) 11 R. I. 370. Though these cases are authoritative, they present a difficulty not found in the inheritance cases. The accepted doctrine of firm title, Burdick, Partn. (2nd Ed.) 98, 146, 148, precludes any conception of individual beneficial seisin like that of an ordinary land owner. But since the firm is not an entity, Burdick, *supra,* 81, it is evident that the beneficial seisin must rest in the partners in some individual capacity. Whatever the nature of this seisin, it is clearly not the orthodox seisin necessary to sustain dower, nor is it that of tenants in common, as often intimated. *Dyer* v. *Clark* (Mass. 1843) 5 Met. 562, 577; *Pepper* v. *Smith* (1887) 24 Ill. App. 316. See Burdick, *supra,* 101, *et seq.*

None of these difficulties is relieved by a recent decision in Arkansas. On A's death, his co-partners, B and C, bought in the partnership plant at a sale ordered on their *ex parte* petition. Before the confirmation of the sale A's administrator acquiesced in the irregularity of such a purchase by surviving partners. Later A's heirs claimed that as a portion of the property was realty they should have been served. It was held that they were not parties in interest. *French* v. *Vanatta* (Ark. 1907) 104 S. W. 141. This result would, of course, be reached in England. *Supra.* If the sale had been to a third party and the personalty had been insufficient to meet firm obligations, the decision would be sustained by the American cases generally. Under the rule earlier submitted the decision on its actual facts is plainly wrong. As the heir's rights had attached at the time of A's death to the realty attempted to be sold by A's administrator, it follows that these rights could not be barred by any act of the personal representative. That such a sale, *bona fide,* leaves the distributees remediless except against the administrator, is settled, *Kimball* v. *Lin-*

coln (1881) 99 Ill. 578, but there is no clear authority for the statement of a text-writer that the heir is similarly limited. Bates, Partn. § 924. In *Valentine* v. *Wysor* (1889) 123 Ind. 47, the "heirs" were devisees and the will conferred power of sale, and in *Steinberg* v. *Larkin* (1897) 58 Kan. 201, the heirs were parties to the sale proceedings. The reasoning in the principal case was clearly anomalous. The argument was that the sale itself worked the conversion into personalty, so that when the administrator acquiesced, he was competent to represent the whole estate. If the sale worked the conversion, it does not appear how the administrator's acquiescence could affect the heir as of the time of the order of sale, when some of the property was still realty. The confusion in the law of partnership realty may well have contributed to the adoption in the proposed American Partnership Act, § 1 Reports, Amer. Bar Ass'n, 1906, Pt. 2, 440, of the mercantile view of the firm as a legal entity. Under this theory the heir has no rights and the widow, no dower. Act, § 22.

EQUITABLE JURISDICTION OF UNILATERAL ERROR OF LAW.—It has been stated that the jurisdiction of Chancery to relieve from error of law is "a recognized and highly beneficial branch of remedial justice." Story, Eq. Jur., 12th ed., Redfield's note, § 138a, *et seq.;* id. 13th ed., Bigelow's note, 112 *et seq.* That logically and as a matter of policy such relief should be granted, 7 COLUMBIA LAW REVIEW 279, is neither reason nor excuse for a misstatement of the present status of the law. Eight criteria of relief from unilateral error (to which this discussion is confined) have been advanced. The theory of Lord Westbury that *ignorantia juris non excusat* has reference only to general law as distinguished from private right and interest, *Cooper* v. *Phibbs* (1867) L. R. 2 Eng. & Ir. App. 149, apart from an obvious difficulty of application, is supported only by dicta. In a quite different sense, the suggestion has a proper use, special as distinguished from general legislative acts being without the operation of the maxim. *King* v. *Doolittle* (Tenn. 1858) 1 Head 77. Lord King's attempt to relegate the rule to criminal jurisprudence solely, *Lansdown* v. *Lansdown* (1730) Mos. 364; *Wyche* v. *Greene* (1854) 16 Ga. 49, 57, is likewise irreconcilable with authority. *Rankin* v. *Mortimer* (Pa. 1838) 7 Watts 372; *Goltra* v. *Sanasack* (1870) 53 Ill. 456. A mistake concerning an unquestioned, unequivocal legal rule has been held relievable; otherwise where the mistake concerns a doubtful or unsettled rule. Snell, Equity, 371. Whether true or not where compromises are concerned, *Naylor* v. *Winch* (1824) 1 Sim. & Stu. 555; cf. *Faust's Adm'x* v. *Birner* (1860) 30 Mo. 414, so far is this test from being universal that some jurisdictions hold exactly the reverse, giving relief "where the law is confessedly doubtful and * * * ignorance may well exist." *McKay* v. *Smith* (1902) 27 Wash. 442; Bispham, Eq., 5th ed., 275. Neither distinction seems theoretically intelligible or of practical expediency. *Good* v *Herr* (Pa. 1844) 7 W. & S. 253. Where relief seems given for error of settled law, *Lansdown* v. *Lansdown, supra,* the error is not *per se* the foundation of jurisdiction but rather a medium to establish some other proper ground of relief. *Hunt* v. *Rousmanier's Admin'rs* (1828) 1 Pet. 1, 15, 16. Adopting a dictum that "ignorance is not mistake," *Fletcher* v

Tollet (1799) 5 Ves. 14, a few Southern jurisdictions maintain that confusion has arisen from failure to differentiate the former which is passive and incapable of proof, hence never relievable, from the latter. *Lawrence* v. *Beaubien* (S. C. 1831) 2 Bailey 623; *Culbreath* v. *Culbreath* (1849) 7 Ga. 64; *State* v. *Paup* (1852) 13 Ark.* 129. The overwhelming weight of authority, indicating that "this savours of hair-splitting," *Griffith* v. *Sebastian County* (1886) 49 Ark. 24, and that the result of the two is identical, Bouvier, Law Dict., tit. Ignorance, rejects the distinction. *Schlesinger* v. *U. S.* (1863) 1 Ct. of Cl. 16; *Gwynn* v. *Hamilton's Adm'r.* (1856) 29 Ala. 233. In accordance with an equitable tendency, error of law, admittedly not a ground for affirmative relief, has been held a good defense. *Sullivan* v. *Jennings* (1888) 44 N. J. Eq. 11. Obviously, the mistake when combined with other elements which practically invariably appear, *infra,* where relief is granted, is more effective from the negative than from the affirmative aspect. But to assert a general rule as stated would be not only to ignore authority but to overlook the true, if not always the confessed *ratio decidendi.* See *Peters* v. *Florence* (1861) 38 Pa. St. 194. Arguing that a person may err as to his own antecedent legal rights which are to be affected, although he fully understands the effect of the transaction itself, or may be correct as to his existing rights and in error with respect to legal effect, it has been ingeniously suggested that error of law of the first type—"analogous to, if not identical with, a mistake of fact"—is relievable; while error of the second type is not. Pomeroy, Eq. Jur., § 849. In deciding "hard" cases, some jurisdictions have willingly fallen into this mistake. *Toland* v. *Corey* (1890) 6 Utah 392; *Alabama etc. Ry. Co.* v. *Jones* (1895) 73 Miss. 110; cf. *Gross* v. *Leber* (1864) 47 Pa. St. 520. However, the principle of *ignorantia juris non excusat* was unquestionably derived from the civil law, 1 Spence, Eq. Jur. 632, in which the typical case of unrelievable error of law undeniably falls within the first class. Dig., XXII, tit. VI, 1, 9. Logically, also, the maxim not merely charges the individual with knowledge of effect, but also with knowledge of his legal rights. *Evans* v. *Hughes County* (1892) 3 S. D. 244; *Jordan* v. *Stevens* (1863) 51 Me. 78. Strong authority supports this position. *Weed* v. *Weed* (1883) 94 N. Y. 243; *Haviland* v. *Willets* (1894) 141 N. Y. 35; *Gwynn* v. *Hamilton's Adm'r., supra; Bintley* v. *Whittemore* (1867) 18 N. J. Eq. 366; *Peters* v. *Florence, supra; Norris* v. *Crowe* (1903) 206 Pa. St. 438; *Stafford* v. *Stafford* (1857) 1 De G. & J. 193, 202; *Zollman* v. *Moore* (Va. 1871) 21 Gratt. 313. If, on the other hand, the error is admitted, for argument's sake, as one of fact, the emptiness of the proposed criterion of unilateral error of law becomes manifest.

The reason for the failure of the tests thus far considered to explain the exercise of the relief oftentimes granted in cases of either type indicated, appears to lie in the assumption that for pure error of law of some sort or another, Equity will interfere. The decided weight of authority, however, demonstrates that astute as Chancery is to furnish a remedy where there is error of law, *Hemphill* v. *Moody* (1879) 64 Ala. 468, a mere naked error is not relievable; *Midland etc. Ry. Co.* v. *Johnson* (1858) 4 Jur. N. S. 643; but where relief is granted some other and special equity

is also present as a controlling factor. *Bank* v. *Daniel* (1838) 12 Pet. 32; *Hollingsworth* v. *Stone* (1883) 90 Ind. 244. Thus, any trace of constructive fraud, or of inequitable conduct, as where one party knew and took advantage of an error of law by the other which he did not correct, *Haviland* v. *Willets, supra,* will turn the scale. *A fortiori,* relief is justified by evidence of misrepresentation, *The Chestnut-Hill etc. Co.* v. *Chase* (1840) 14 Conn. 123; *Hardigree* v. *Mitchum* (1874) 51 Ala. 151, even though innocent, *Wilson* v. *Maryland etc. Co.* (1882) 60 Md. 150, undue influence, *Sands* v. *Sands* (1885) 112 Ill. 225, surprise, *Evans* v. *Llewellyn* (1787) 1 Cox Eq. Cas. 332, imbecility, *Nelson* v. *Betts* (1886) 21 Mo. App. 219, misplaced confidence, *Hall* v. *Otterson* (1894) 52 N. J. Eq. 522, deception, *Toland* v. *Corey, supra,* ignorance of the facts, *Lumber Exch. Bk.* v. *Miller* (N. Y. 1896) 18 Misc. 127, a fiduciary relation, *Ludington* v. *Paton* (1901) 111 Wis. 208, or gross disparity in position, *Alabama etc. Co.* v. *Jones, supra.* A few jurisdictions add the further qualification that if a decree would result in an unconscionable advantage, the hardship plus the error suffices. *Wilson* v. *Ott* (1896) 173 Pa. St. 261; *Griswold* v. *Hazard* (1890) 141 U. S. 260. Contra, *Champlin* v. *Layton* (N. Y. 1837) 18 Wend. 407; *Weed* v. *Weed, supra; Lancaster* v. *Flowers* (1904) 208 Pa. St. 199. The conclusion necessarily follows that the vast majority of decisions relied on to sustain the doctrine of remedy for unilateral error of law fall short of that position. Willard, Eq. Jur. (2d Ed.) 61. A recent Iowa decision is in full harmony with this theory. The plaintiff, though aware of the facts, was ignorant of the quantum of her interest, that is of her antecedent rights, the case falling accordingly within the first group above discussed, where relief for naked error of law is said to be allowed. It appeared, however, that although the defendant knew of the plaintiff's mistake, he made no endeavor to rectify it. Rescission of a conveyance was, therefore, properly granted. *Faxon* v. *Baldwin* (Ia. 1907) 114 N. W. 40. The error of law, combined with the constructive fraud of the defendant, made out a perfect case for equitable relief under the authorities.

PROPERTY *in Custodia Legis* UPON APPOINTMENT OF A RECEIVER.—When a court of equity administers the assets of a corporation through a receiver, such property is said to be within the custody of the law. The status of the property is changed: the incidents of corporate ownership cease, and a creditor's right to obtain a lien is suspended. *Cowan* v. *Plate Glass Co.* (1898) 184 Pa. 1. It is important to determine this point in the proceedings beyond which rights cannot be enlarged or modified. The question may be considered with reference to the right which is being exercised, e. g., the right to bring a similar suit in a court of concurrent jurisdiction; *May* v. *Printup* (1877) 59 Ga. 128; or the right to make a levy upon execution. *Maynard* v. *Bond* (1878) 67 Mo. 315. When the jurisdiction of one court attaches to property, the exercise of which requires possession and control, no interference by another court is allowed. It might be conceived that the second court is powerless to acquire jurisdiction, because the property is *in custodia legis:* "When one [court] takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power as though it had been carried

physically into a different territorial sovereignty." *Covell* v. *Heyman* (1883) 111 U. S. 176. It is usually held, however, that the non-interference is due to comity. *Buck* v. *Colbath* (1865) 3 Wall. 334; *Adams* v. *Trust Co.* (1895) 66 Fed. 617, 622; *Gilman* v. *Perkins* (1881) 7 Fed. 887. Even then, it must be determined when the property is *in custodia legis*, for until then, see *Wilmer* v. *Atlantic Ry. Co.* (1874) 2 Woods 409, 420, the jurisdiction of the other court has not attached. In fixing upon such point, the court, considering that otherwise the assets could be withdrawn from the court and the object of the bill never attained, *Gaylord* v. *Fort Wayne etc. Ry. Co.* (Fed. 1875) 6 Biss. 286, 291, will hold the status of the property fixed at the earliest moment. Some courts have intimated that merely filing the bill might be sufficient. *Texas etc. Ry. Co.* v. *Lewis* (1891) 81 Tex. 1. Actual seizure is unnecessary. *Wilmer* v. *Atlantic etc. Ry. Co., supra.* The general rule is that where possession is necessary to the relief asked, the filing of the bill to administer the property for all creditors, and service of process, puts the property *in custodia legis. Belmont Nail Co.* v. *Col. etc. Co.* (1891) 46 Fed. 8; *May* v. *Printup, supra.* But all these elements must be present. *Ill. Steel Co.* v. *Putnam* (1895) 68 Fed. 515. In such cases, filing the bill is an "equitable levy." *Adams* v. *Trust Co., supra.*

Such considerations, however, do not arise when the time that the jurisdiction attaches is sought to be fixed to determine the rights of creditors to attach or levy executions on the property, under a decree of a court that has sole jurisdiction. But the court's desire to preserve equality among creditors—causing them sometimes to call the assets a "trust fund"—will lead them to suspend the *jus disponendi* as soon as possible. Shall, then, the principles which determine *custodia legis* in questions of conflicting jurisdictions, be applied to limit this right of creditors? As a general rule, they are not. The property may pass *in custodia legis*, first, when the receiver actually takes possession of the property; *Farmers' Bank* v. *Beaston* (Md. 1836) 7 G. & J. 421; second, the receiver's title may relate back to the order of appointment (the weight of authority); *Rutter* v. *Tallis* (N. Y. 1852) 5 Sandf. 610; *Conn. River Banking Co.* v. *Rockbridge Co.* (1895) 73 Fed. 709; third, the filing of the bill may fix the rights of the parties. *Merrill* v. *Comm. Ins. Co.* (1896) 166 Mass. 238. Here are two distinct ideas: the one, that the diligent creditor shall be allowed to secure a preference; the other, that "equality among creditors is equity." This proceeding to administer assets, with the resulting equality of distribution, is statutory. Being for the benefit of all creditors, a priority would be unjust, and to prevent this the sequestration must take effect from the institution of the proceedings. *Atlas Bank* v. *Nahant Bank* (1840) 23 Pick. 480. A recent New Jersey case takes a different view, holding that the filing of a bill and the issuance of a restraining order upon the corporation, did not prevent a judgment creditor from levying an execution. *Supra* v. *Princeton Lighting Co.* (1907) 68 Atl. 176. In equity, diligence is favored as well as equality, and neither should be preferred at the expense of the other. The judgment creditor has been diligent in bringing his suit; his diligence goes for naught if the filing of a bill by another creditor

any time before his suit comes to judgment, would put the property beyond execution. The principal case enables both principles to operate. It is not open to the objection that it allows a creditor to discover the state of affairs from the bill itself, to begin suit, obtain judgment and to levy execution before the order of appointment, for the interim will be made too short to permit such a result. This, it is true, where no restraining order was granted, would still leave the property open to attachment; but, such process issues only on some prescribed statutory ground, e. g., that the debtor is about to make some fraudulent disposition. Such attachment merely protects one, with no detriment to the other creditors, for the fraud would equally harm them under the receiver. Upon all these considerations, it is submitted that the decision of the principal case is the sounder, and is attended with less inconvenent results.

NEGOTIABILITY OF JOINT STOCK ASSOCIATION BONDS EXEMPTING SHAREHOLDERS' LIABILITY.—At common law, a joint stock association is a partnership. *Griffith* v. *Paget* (1877) L. R. 6 Ch. Div. 511; *Townsend* v. *Goewey* (N. Y. 1838) 19 Wend. 424. As in a simple partnership, *Haskins* v. *D'Este* (1882) 133 Mass. 356, the contracts of the association are the contracts of its members, *Tappan* v. *Bailey* (Mass. 1842) 4 Metc. 529; *McGreary* v. *Chandler* (1870) 58 Me. 537; contra, *Walker* v. *Wait* (1878) 50 Vt. 668, upon which they are primarily liable. *Keasley* v. *Codd* (1826) 2 C. & P. 408; *Skinner* v. *Dayton* (N. Y. 1822) 19 Johns. 513. It is not inconsistent with the general nature of the partnership that the death of a member does not work a dissolution, *McNeish* v. *Hulless Oat Co.* (1884) 57 Vt. 316, or that its shares are transferable. *Edwards* v. *Warren etc. Works* (1897) 168 Mass. 564. Whether statutes adding further corporate features have created a new juridical person, depends upon the nature of the legislation. If the statutory features are inconsistent with the conception of a partnership, the legislature is assumed to have created an artificial entity or quasi-corporation. Such is the limited company of England and some of the States. *In re Reese etc. Co.* (1867) 36 L. J. Ch. 618, 623; *Oak Ridge Co.* v. *Rogers* (1884) 108 Pa. 147; *Staver etc. Co.* v. *Blake* (1896) 111 Mich. 282. For jurisdictional purposes on the ground of diverse citizenship, it fails to qualify as a corporation, *Great Southern Hotel Co.* v. *Jones* (1900) 177 U. S. 449, but the Supreme Court shows a reluctance to extend the privilege of a corporation rather than a refusal to recognize the artificial person, and the association may sue in its own name when jurisdiction is invoked on other grounds. *Sanitas Co.* v. *Force Co.* (1902) 124 Fed. 302. On the other hand, if the statutory provisions are procedural, intended only to afford a convenient remedy, the fundamental nature of the association remains unchanged. *Gott* v. *Dinsmore* (1872) 111 Mass. 45. The New York associations seem to fall within this category. *People* v. *Coleman* (1892) 133 N. Y. 279; *Chapman* v. *Barney* (1888) 129 U. S. 677. While for some purposes the association or its officer, has been considered a corporation, as in the adjustment of claims between the association and shareholders, *Westcott* v. *Fargo* (1875) 61 N. Y. 542, service of process in a foreign state, *State*

v. *Adams Express Co.* (1896) 66 Minn. 271, or for taxation, *People* v. *Wemple* (1889) 117 N. Y. 136; *Matter of Jones* (1902) 172 N. Y. 575, the important distinction has not been obliterated that the contracts and debts of the association are the original contracts and debts of the shareholders as partners. *People* v. *Coleman, supra; Snyder* v. *Lindsey* (N. Y. 1895) 92 Hun 432; *United Press* v. *Abell Co.* (N. Y. 1903) 87 App. Div. 344. This view of the New York association is taken by the Massachusetts courts. *Taft* v. *Ward* (1871) 106 Mass. 518; contra, *Edgeworth* v. *Wood* (1896) 58 N. J. L. 463. Since the Code, Code Civ. Proc. §§ 1919-1924, authorizes only such suits against the officer as would be enforcible against the shareholders, *McCabe* v. *Goodfellow* (1892) 133 N. Y. 89, and permits suits against the members in the first instance, *Schwartz* v. *Wechler* (N. Y. 1892) 2 Misc. 67, it would be difficult to define a shareholder's liability, if the association is to be considered an artificial person. It is not in the nature of a suretyship nor of course is it statutory. This difficulty was ignored by the majority in the recent case of *Hibbs* v. *Brown* (N. Y. 1907) 82 N. E. 1108. The question at issue was the negotiability of a bond of the Adams Express Co. containing a stipulation that "no shareholder shall be liable as partner or otherwise in respect to this bond," under the rule that a negotiable instrument must pledge the general credit of the maker. Four justices took the view—a view undoubtedly in accord with commercial conceptions, but, it is submitted, a departure from the present legal conceptions—that the bonds are the obligations of an artificial person distinct from the shareholder, whose liabilities are secondary.

Adopting this conception, the negotiability of the bonds logically follows. The case of *Heflin etc. Co.* v. *Hilton* (1899) 124 Ala. 365, cited for the proposition that the note of a corporation not enforcible against stockholders is non-negotiable, 7 Cyc. 578, does not support that proposition, nor is the proposition sound upon principle. The rule that the instrument must pledge the general credit of the maker, *Munger* v. *Shannon* (1874) 61 N. Y. 251, is the converse of the rule that the promise must not be to pay out of a particular fund. If, therefore, a maker pledges all his funds without limitation, this rule is satisfied. The test is the resources of the debtor, not the resources upon which the creditor may call. The exemption of a superadded credit of a third party, as that of a general surety for the debts of the maker, or the secondary liability of the stockholders of a corporation to third parties, would not be a restriction upon the general credit of the maker. The fact that the general credit of a partnership is the credit of its members is not inconsistent with this rule, for, though the partnership may not draw upon the partners to the full extent of their resources, the contracts of the partnership are the contracts of the partners and, therefore, must pledge their individual credit. If, therefore, a joint stock association contracts as a quasi-corporate entity, a limitation upon the shareholders' liability does not destroy the negotiability of its paper; if it contracts as a partnership, the limitation is fatal. See *Hess* v. *Werts* (1818) 4 Sarg. & R. 356.

The minority, rejecting the entity theory, preserve the negotiability of the bonds by declaring the stipulation void. On grounds of public

policy, a limitation on the liability of partners has been generally looked upon with disfavor, *Imperial Co.* v. *Jewett* (1901) 169 N. Y. 143; *Hess* v. *Werts, supra,* but recognized if third parties choose to contract on such terms and an enforcible right remains. *Bank of Topeka* v. *Eaton* (1900) 100 Fed. 8. Since the Code provides no remedy not enforcible against the shareholders, *supra,* and the stipulation gives the shareholders immunity from suit, the position of the minority which gives effect to the primary intention to make a binding contract, seems sound, and it is more logical to base this position, as Werner, J., did, upon the ground that the stipulation was repugnant to the general tenor of the bond, than upon the broad ground of public policy.

VALUATION OF THE PROPERTY OF PUBLIC SERVICE COMPANIES.—When the property of a public service company is taken by a state or municipality under condemnation proceedings, *Matter of Brooklyn* (1894) 143 N. Y. 596, or under contract leaving the purchase price to be subsequently determined, *Matter of Water Com'rs* (N. Y. 1902) 71 App. Div. 544, the problem of ascertaining the fair and just compensation has proven to be most vexatious and one upon which the courts have shown no little divergence of opinion. Several theories, none of them exclusive, have been advanced: first, the original cost of the plant to the company; *Montgomery County* v. *Schuylkill Bridge Co.* (1885) 110 Pa. St. 64; *West Chester etc. Co.* v. *Chester County* (1897) 182 Pa. St. 40; second, the present cost of reproduction; *Brunswick etc. Water Dist.* v. *Maine Water Co.* (1904) 99 Me. 371, 382; *Matter of Water Com'rs, supra;* third, the capitalized value of its net income; *Nat'l Water Works Co.* v. *Kansas City* (1894) 62 Fed. 853; and fourth, the market value of its stock. *Mifflin Bridge Co.* v. *Juniata County* (1891) 144 Pa. St. 365; *Montgomery County* v. *Schuylkill Bridge Co., supra.* The first consideration—that of original cost—has received considerable attention from the courts. In order, however, for it to have any bearing upon present value, the extent of depreciation of the plant must be considered; *Kennebec Water Dist.* v. *Waterville* (1902) 97 Me. 185; moreover, there must be assurance that there were no fraudulent transactions and that the money was legitimately and wisely spent in the construction. *Brunswick etc. Water Dist.* v. *Maine Water Co., supra.* In the few cases in which original cost is considered to be the controlling element, the value of the franchise is added. *Montgomery County* v. *Schuylkill Bridge Co., supra; Clarion Turnpike Co.* v. *Clarion County* (1896) 172 Pa. St. 243; *West Chester etc. Co.* v. *Chester County, supra.* The objection to this test is that it may force the State to pay for an antiquated plant an amount greatly exceeding the cost of a modern and more efficient system. The second test—cost of reproduction—has received less consideration from the courts, seemingly on account of its severity; see, *Matter of Water Com'rs* (1903) 176 N. Y. 239, and in some cases has been entirely rejected. *Montgomery County* v. *Schuylkill Bridge Co., supra; Metropolitan Trust Co.* v. *H. & T. C. Ry. Co.* (1898) 90 Fed. 683. Value is thus determined in the competitive business field, but this rule is less applicable to public service callings because the capital can generally be less easily diverted

to other channels, and more especially because they are subject to regulation and supervision. Here, likewise, the franchise must be separately considered. See, *Nat'l Water Works Co.* v. *Kansas City, supra.* The third and fourth tests are very similar and both superficial, though sometimes considered. *Mifflin Bridge Co.* v. *Juniata County, supra.* Under these tests value depends upon the income received, which is governed by the rates charged. But since the rates which may lawfully be charged may only be a fair return upon the value of the property, it is begging the question to say that value then depends upon rates. See, *Brunswick etc. Water Dist.* v. *Maine Water Co., supra.* If the rates are assumed reasonable, the results reached by these methods will, of course, approximate the valuation upon which the rates are theoretically based. The fact that the plant is a "going concern" is universally conceded to be a proper subject for compensation. *Edinburg etc. Co.* v. *Edinburg* (1894) 71 L. T. Rep. 301; *Gloucester etc. Co.* v. *Gloucester* (1901) 179 Mass. 365, 383; *Newburyport etc. Co.* v. *Newburyport* (1897) 168 Mass. 541. Good will might well be considered if competition exists, but not if the company has a monopoly, for its customers have no choice. *Kennebec Water Dist.* v. *Waterville, supra.* For the most part, the courts have refused to confine themselves to any single test, but say that all must be taken into consideration. This amounts to a practical confession that they are helpless to formulate a rule to cover a difficult and intricate situation and is simply an attempt to reach an equitable result in each case. See, *Nat'l Water Works Co.* v. *Kansas City, supra; Brunswick etc. Water Dist.* v. *Maine Water Co., supra; Kennebec Water Dist.* v. *Waterville, supra.*

The question of valuation of the franchise is usually separately considered. That it is property, *West River Bridge Co.* v. *Dix* (1848) 6 How. 507, and may not be directly taken without compensation, is generally recognized, *Monongahela Navigation Co.* v. *United States* (1892) 148 U. S. 312; *People* v. *O'Brien* (1888) 111 N. Y. 1, though the same result can be indirectly reached by granting other franchises so that the resulting competition would be ruinous. *Charles River Bridge* v. *Warren Bridge* (Mass. 1837) 11 Pet. 420; *Syracuse Water Co.* v. *City of Syracuse* (1889) 116 N. Y. 167. In computing its value, consideration must be taken as to its character, whether it be exclusive or non-exclusive, *Brunswick etc. Water Dist.* v. *Maine Water Co., supra; Gloucester etc. Co.* v. *Gloucester, supra,* the length of time it is to run, *Kennebec Water Dist.* v. *Waterville, supra; Sunderland Bridge Case* (1877) 122 Mass. 459, 466, and whether or not it be subject to forfeiture. See *Kennebec Water Dist.* v. *Waterville, supra; Bridge Co.* v. *United States* (1881) 105 U. S. 470, 482. If but part of a franchise is condemned, compensation must be made to the extent to which it has been impaired. *United States* v. *Gettysburg Electric R. R.* (1896) 160 U. S. 668. Franchise valuation is generally measured with reference to rates which the company has charged, in order to compute what its revenue would probably have been during the unexpired period. *Sunderland Bridge Case, supra; Montgomery County* v. *Schuylkill Bridge Co., supra.* In a recent English case, a municipality entered into a contract to purchase a street railway when

it should be constructed. It was held that the price paid should be the value as a structure, including the element of a going concern, but excluding the franchise value. *Mayor etc. of Dudley* v. *Dudley etc. Ry. Co.* (1907) 97 L. T. Rep. 556. This result was reached upon the interpretation of the contract, but under the Tramways Act of 1870, similar results have been reached in the absence of contract, *Stockton etc. Water Board* v. *Kirkleatham Local Board* (1894) 69 L. T. Rep. 661; *Edinburg etc. Co.* v. *Edinburg, supra,* though in estimating value for the purpose of taxation, the franchise has been considered. *Pimlico etc. Co.* v. *Assessment Committee* (1874) 29 L. T. Rep. 605; *The King* v. *Lower Mitton* (1829) 9 B. & C. 810. This distinction is not illogical, for retaking without compensation would proceed on the ground that the franchise was granted gratuitously, taxation, on the ground of benefits received.

JURISDICTION OF COURTS OF BANKRUPTCY.—Under the Bankruptcy Act of 1898, as interpreted in *Bardes* v. *Hawarden Bank* (1900) 178 U. S. 524, the trustee could sue an adverse claimant in the Federal courts only with the latter's consent. The inconvenience experienced from thus placing the trustee at the mercy of the state courts led to the Amendment of 1903, which gave the Bankruptcy Court jurisdiction over suits to recover preferences, § 60b, and other fraudulent conveyances, etc., § 67e, given within the four months' period. § 70e gave the trustee power to avoid any transfer which any creditor might have avoided and to recover the same from any transferee except a *bona fide* holder for value, concluding with the same words as were used in §§ 60b and 67e: "For purpose of such recovery any court of Bankruptcy * * * and any State court which would have jurisdiction if bankruptcy proceedings had not intervened, shall have concurrent jurisdiction." § 23b has cast the meaning of this subdivision into grave doubt by its provision that the trustee shall only sue where the bankrupt would have been able to sue (except under §§ 60b or 70e) if bankruptcy proceedings had not intervened, unless the proposed defendant consents. One view is that § 70e must confer jurisdiction on the Bankruptcy Court whether the defendant consents or not, because any other construction would make § 70e of no effect, as jurisdiction probably existed anyway in case of consent, and because § 70e being a special provision, should override § 23b, a general one. *Hurley* v. *Devlin* (1906) 149 Fed. 268. The contrary view, supported by the weight of authority, *Skewis* v. *Barthwell* (1907) 152 Fed. 534; *Gregory* v. *Atkinson* (1904) 127 Fed. 183, rests on the fact that the Senate struck out § 70e from the exceptions to § 23b, and that the subject matter of § 70e (in marked contrast to §§ 60b and 67e) deals with transfers voidable under state law. The presence of § 70e is explained on the theory that Congress wished clearly to confer jurisdiction in case of consent.

Since suits by the trustee to recover property can only be brought under §§ 60b, 67e, and 70e, what constitutes an adverse claimant is now chiefly of importance in determining the summary jurisdiction of the Bankruptcy Court. No matter how complete a title an alleged claimant may assert against the trustee, the Bankruptcy Court may take jurisdiction preliminarily to see whether any basis for the claim, fraudulent or other-

wise, exists. *Mueller* v. *Nugent* (1902) 184 U. S. 1; *In re Tune* (1902) 115 Fed. 906; cf. *Eyster* v. *Gaff* (1875) 91 U. S. 521. Actual possession by the alleged adverse claimant, or possession by his authorized agent, or, possibly, a right to immediate possession, would always seem necessary to defeat the summary jurisdiction. Cf. *Clarke* v. *Larremore* (1903) 188 U. S. 486, 490; *In re Knickerbocker* (1903) 121 Fed. 1004; *Whitney* v. *Wenman* (1905) 198 U. S. 539, 552, 553. Mere possession, however, not accompanied by facts raising, at least, a doubt as to the invalidity of the claim seems insufficient, *Mueller* v. *Nugent, supra,* 1, 17; *In re Tune, supra; In re Friedman* (1907) 153 Fed. 939, but a personal interest, however slight, coupled with possession seems sufficient. Cf. *Comingor* v. *Louisville Trust Co.* (1902) 184 U. S. 18. Thus the general assignee for the benefit of creditors, within the four months' period, acting under the State law was held not an adverse claimant, *Bryan* v. *Bernheimer* (1901) 181 U. S. 188, while the general assignee, under similar circumstances with a personal interest of very doubtful validity for services and expenses incurred in connection with the assignment, was held an adverse holder of the funds retained for services and expenses. *Louisville Trust Co.* v. *Comingor, supra.* An officer holding property or the proceeds under a levy or execution avoided by the act is not an adverse holder, cf. *In re Tune, supra; Clarke* v. *Larremore, supra,* nor is the judgment creditor an adverse claimant of the funds thus held; at any rate not until after time for the return of execution has passed. *Clarke* v. *Larremore, supra; In re Graessler* (1907) 154 Fed. 478. In a recent case, a judgment creditor holding a waiver note had, before petition filed, levied on property of the bankrupt marked exempt in his schedule, and received the proceeds of the execution sale. The bankrupt then sought to amend his schedule by including this property, and the court reversed the referee's summary order to the creditor to pay over the proceeds. *In re Edwards* (1907) 156 Fed. 794. This decision seems sound and not opposed to the preceding case, for the fact that title to the exempt property does not pass to the trustee, *In re Seabolt* (1902) 113 Fed. 766, but custody only for the sake of setting apart, cf. *Lockwood* v. *Exchange Bank* (1903) 190 U. S. 294, together with the fact that the merits of the bankrupt's alleged right to amend had not been determined, would seem to have been easily enough to render the creditor's claim sufficiently colorable to make him an adverse claimant. Moreover, the possible estoppel on the creditors because of their failure to object to the first schedule would seem to strengthen this claim.

Before the appointment of the trustee, however, the summary jurisdiction of the court to take possession of property seems more extensive. *In re Haupt* (1907) 153 Fed. 939; cf. *Bryan* v. *Bernheimer, supra.* This is justified by the greater need for the exercise of such jurisdiction at that time, and by special provisions of the Act, § 2, subd's 3, 7, and 15. A recent case held that the courts could not direct an adverse claimant to surrender property to the receiver. *In re Andre* (1905) 68 C. C. A. 374. This may turn partly on the idea that title was to be disposed of summarily and partly on the fact that the adverse holder was an officer under the order of the state court, cf. *Clarke* v. *Larremore, supra,* which

raises the very different question of comity. *In re Watts & Sachs* (1903) 190 U. S. 1; see 8 COLUMBIA LAW REVIEW 213. By the better view the court should have the power to order seizure or surrender of property claimed adversely, where there is great danger of the estate's being dissipated. Cf. *In re Haupt, supra; In re Young* (1901) 111 Fed. 158.

EXCLUSION OF EVIDENCE OF CHARACTER BASED ON PERSONAL KNOWLEDGE.—The decision in *Regina* v. *Rowton* (1865) Leigh & Cave 520, although due to a misunderstanding of an earlier case, 3 Wigmore, Evid. § 1981, has led to a reversal of the earlier practice of allowing a witness to speak from his own knowledge of a person's character. Peake, Evid. (2nd Am. Ed. 1803) 7; *Mawson* v. *Hartsink* (1802) 4 Esp. 102. Except that former acts of illicit intercourse with the defendant may be shown when the character of a prosecutrix in rape is put in issue on the question of consent, *Rogers* v. *State* (1876) 1 Tex. Ct. App. 187, the rule is at present almost universally laid down that when character comes in issue collaterally, as to furnish a presumption that the accused did not commit the crime in question, or that a witness is not speaking the truth, the only evidence admissible is that of reputation. *Knode* v. *Williamson* (1873) 17 Wall. 586; *Hirschman* v. *People* (1882) 101 Ill. 568 574; *State* v. *King* (1883) 78 Mo. 555; *Jackson* v. *State* (1885) 78 Ala. 471. This rule, which is upheld largely upon precedent, and without much attempt at justification, see Taylor Evid. 329, has been reaffirmed in the recent case of *People* v. *Van Gaasbeck* (N. Y. 1907) 82 N. E. 718. The term "general character," originally understood as distinguished from particular acts, *Mawson* v. *Hartsink, supra,* is now misleadingly used in the sense of "reputation," and as convertible with it. *Berneker* v. *State* (1894) 40 Neb. 810, 816; Wharton, Cr. Evid. § 58. The courts evidently conceive of general character as the estimation in which the person is held by the community. *Jackson* v. *State, supra; State* v. *King, supra.* But the question regularly asked of a witness to the credit of another witness, as to whether he would believe him under oath, *People* v. *Davis* (N. Y. 1839) 21 Wend. 309, 315; Peake Evid. (2nd Am. Ed.) 132, would seem rather to elicit testimony as to the witness's personal estimate, based on what he has heard in the community. And the questions asked of a witness to the character of a defendant would seem to give rise to the same kind of testimony, unless the witness were familiar with the technical legal meaning of the term "character." See *Keener* v. *State* (1855) 18 Ga. 194, 220. But under neither conception is this evidence free from the objections urged against testimony from personal knowledge of character, the principal of which objections is that it is opinion evidence. If this objection be tenable, reputation must be excluded as a mere aggregate of opinions, *State* v. *Lee* (1876) 22 Minn. 407, based at least in part upon hearsay, or as opinion based upon rumor and hearsay rather than upon knowledge of the actual facts. The probative force of reputation is rendered less by the fact that a person's actions vary at different places and under different circumstances. *Keener* v. *State, supra.* In *Comm.* v. *Webster* (Mass. 1850) 5 Cush. 295, 324, it is noted

that reputation is of little value in trials for great and atrocious crimes, inasmuch as they are generally committed when the person is acted upon by influences not frequently operating on the human mind, whereas reputation would be a guide only as to what the man would do under ordinary conditions. It would seem that the testimony of one who has observed a person's actions under various circumstances would furnish a safer and more accurate guide in the case of both greater and lesser crimes. The trial courts, recognizing the value of such evidence, rarely observe the strict rule closely. 3 Wigmore, Evid. § 1981.

Some confusion has arisen, *McQueen* v. *State* (1895) 108 Ala. 54; *Comm.* v. *O'Brien* (1876) 119 Mass. 342, 346, from failure to distinguish clearly between those cases where reputation is the actual issue, as in slander and libel, *Whitney* v. *Janesville Gazette* (1873) Fed. Cas. No. 17590, and in homicide when the reputation of the deceased bears upon notice to defendant under the issue of self-defense, *Marts* v. *State* (1875) 26 Oh. St. 162, and those cases where the evidence of reputation is offered only as proof of the actual character. *State* v. *Sterrett* (1885) 68 Ia. 76. Opinion based upon personal observation is admitted in the analogous cases of habit, *Baldwin* v. *West R. R. Corp.* (Mass. 1855) 4 Gray 333, character of animals, *Norris* v. *Warner* (1894) 59 Ill. App. 300; *Lynch* v. *Moore* (1891) 154 Mass. 335, and sanity, *Johnson* v. *State* (1901) 42 Tex. Cr. 618; *Ragland* v. *State* (1899) 125 Ala. 12, 27, and the courts of Iowa, *State* v. *Sterrett, supra,* Minnesota, *State* v. *Lee, supra,* and Ohio, *Gondolfo* v. *State* (1860) 11 Oh. St. 114, *Marts* v. *State, supra,* have refused to follow the prevalent rule, and have admitted evidence of character based upon personal knowledge. These rulings seem the better. Although reputation also has probative force, there seems no sound reason why evidence of character based upon personal knowledge should not be equally admissible.

Effect of Dissolution Upon the Real Property of a Corporation.—Just what happened at common law to the unsold real property of a dissolved corporation has never been authoritatively determined. It has usually been considered, following Coke's opinion, Co. Lit. 13b, that the grantor took by reverter, upon the implied condition that his grant was only for the life of the corporation, *Commercial Bank* v. *Lockwood's Adm'r.* (Del. 1832) 2 Harr. 8; *Fox* v. *Horah* (N. C. 1841) 1 Ired. 358; *Folger* v. *Chase* (1836) 18 Pick 63, 66; and this is still the law with respect to religious, *Mormon Church* v. *U. S.* (1889) 136 U. S. 1; *St. Philip's Church* v. *Zion Church* (1885) 23 S. C. 297, and charitable corporations, *Mott* v. *Danville Seminary* (1889) 129 Ill. 403, though limited, perhaps, to cases where there was no consideration for the grant. *McRoberts* v. *Moudy* (1885) 19 Mo. App. 26. One case, however, held that the land escheated to the lord of the manor, *Johnson* v. *Norway* (1623) Winch. 37; s. c. Co. Lit., Harg. note 71, and has been declared to represent the common law more accurately than Coke's doctrine. Gray, Perp. (2nd Ed.) §§ 44-51. See 2 Harv. L. R. 163. Whatever may once have been the true common law rule, it has long been superseded as to business corporations by statutes making the assets a so-called trust fund for

the benefit of the stockholders and creditors, *State* v. *Bank of Tennessee* (Tenn. 1875) 5 Baxt. 101; *Heath* v. *Barmore* (1872) 50 N. Y. 302, or by decisions reaching a similar result upon general principles of equity. *Bacon* v. *Robertson* (U. S. 1855) 18 How. 480. The court will appoint a receiver to hold the legal title, or else the directors will be held as trustees, usually by statute. *Newfoundland etc. Co.* v. *Schack* (1885) 40 N. J. Eq. 223; *Heath* v. *Barmore, supra.* Occasionally the dissolved corporation has itself been anomalously regarded as a trustee, *St. Louis etc. Co.* v. *Sandoval Coal Co.* (1886) 116 Ill. 170. When the debts had been satisfied, the stockholders have been held tenants in common without the formality of trustees, though apparently upon the theory of a terminated trust. *Baldwin* v. *Johnson* (1901) 95 Tex. 85. The modern decisions are, in general, beneficial instances of judicial legislation, for the doctrine of reverter deserves the frequent reproaches it has received, see 5 Thomp. Corps., § 6745; and escheat would work quite as great an injustice to the stockholders and creditors. It is hardly necessary to observe that the same cogent reasons in favor of the present doctrines do not exist in the case of charitable and religious corporations. While equity will not allow a trust to fail for lack of a trustee, it is obviously better, in the absence of a receiver, to leave the property in the charge of the directors, who have managed it during the life of the corporation, than to name a stranger as trustee. From this point of view, as well as from that of legal consistency, a recent decision, *Diamond State Iron Co.* v. *Husbands* (Del. 1898) 68 Atl. 240, is open to some criticism. A manufacturing corporation through inadvertence became dissolved by expiration of the period for which it was chartered. It was held that, by virtue of a subsequent statute re-enacting the charter and continuing the corporation for twenty years from the passage of the renewing act, title to the real estate, which had reverted to the grantor, but was impressed with a trust in his hands, re-vested in the corporation. This decision achieves a just result by a curious merger of two radically different theories. See 5 Thomp. Corp., § 6746. The only reason for giving the grantor the right of reverter is that his grant impliedly provided for it. *Dean and Canons of Winsor* v. *Webb* (1613) Godb. 211. His rights should depend solely upon the construction of the grant, and he should thus upon the dissolution take either nothing at all, or his land free of any trust. To make him involuntarily a bare trustee is an unnecessary imposition, when the directors stand ready as preeminently the proper persons for the office. They have in fact retained control of the property during the entire period when it is deemed to have been in trust. Even conceding the propriety of the grantor's status, it is difficult to see how by the terms of the renewing act his title was in fact divested; although admittedly the Legislature might have so divested it. *Charles River Bridge* v. *Warren Bridge* (1837) 11 Pet. 420. A court of equity might have compelled the grantor to convey the legal title; but this relief was not sought. To hold the directors as trustees, it is submitted, would obviate many of these difficulties, and would also tend to a uniformity of practice which is to be desired where no receivership exists.

RECENT DECISIONS.

ALEXANDER B. SIEGEL, *Editor-in-Charge.*

BANKRUPTCY—LIFE INSURANCE POLICIES AS ASSETS—EXEMPTIONS.—The bankrupt, having a paid-up policy payable to his children, reserving to himself a stipulated surrender value, payable at specified periods, made a general assignment between two of these periods. *Held*, three judges dissenting, he had no interest that passed to his assignee and under Ky. St., 1903, § 655, the policy was exempt. *Townsend's Assignee* v. *Townsend* (Ky. 1907) 105 S. W. 937.

Where a policy having a cash surrender value, *Van Kirk* v. *Slate Co.* (1905) 140 Fed. 38, or any real value, see 1 COLUMBIA LAW REVIEW 194; *Bank* v. *Willingham's Assignee* (1901) 111 Ky. 64, is not exempt, *In re Slingluff* (1900) 106 Fed. 154, the interest of the bankrupt is property and accordingly passes, *Gould* v. *Ins. Co.* (1904) 132 Fed. 927, subject to the beneficiary's vested rights. *Atkins* v. *Assur. Soc.* (1882) 132 Mass. 395. Thus where the interest is contingent on the insured's living to a certain date, *Brigham* v. *Ins. Co.* (1881) 131 Mass. 319; *Matter of Phelps* (1905) 15 Am. B. R. 170, or surviving the beneficiary, *In re Coleman* (1905) 136 Fed. 818, or where the policy is in endowment form, *Talcott* v. *Field* (1892) 34 Neb. 611, or is payable to the bankrupt's estate and has nearly matured. *In re Mertens* (1904) 131 Fed. 972; *In re Coleman*, *supra*, unless it is burdensome, *In re Buelow* (1899) 98 Fed. 86, the interest as of the date of bankruptcy, *Meyers* v. *Johnson* (1903) 10 Am. B. R. 687, constitutes property and passes. Accordingly in the principal case the bankrupt's interest was clearly property and although Ky. St., 1903, § 655, is broad in terms the construction of the minority seems the sounder. But see *Pulsifer* v. *Hussey* (1903) 97 Me. 434.

BANKRUPTCY—SUMMARY JURISDICTION—ADVERSE CLAIM.—A judgment creditor, holding a waiver note, had levied, before the petition was filed, on property of the bankrupt marked exempt in his schedule, and had received the proceeds of the execution sale. The bankrupt then amended his schedule by including this property. *Held*, a summary order to the creditor to pay over the proceeds would not issue. *In re Edwards* (1907) 156 Fed. 794. See NOTES, p. 219.

CARRIERS—FEROCIOUS ANIMALS—ABSOLUTE LIABILITY.—The defendant, a common carrier, detained several bears in a freight house on his wharf, using every reasonable precaution. The infant plaintiff, a licensee, while forcing himself through the grating of the cage, was injured by one of the animals. *Held*, Cullen, Ch. J., dissenting, no action would lie. *Molloy* v. *Starin* (N. Y. 1908) 38 N. Y. Law Jour. No. 107.

In the absence of any voluntary act on the part of the plaintiff bringing on his injury, *Farley* v. *Picard* (N. Y. 1894) 78 Hun 560, the keeper of animals "naturally mischievous in their kind" is absolutely liable for injury done by them, *Mason* v. *Keeling* (1700) 12 Mod. 332; *Besozzi* v. *Harris* (1858) 1 Fos. & Fin. 92, irrespective of negligence upon his part, Burdick, Torts 449, resting perhaps upon the theory of nuisance *per se*, Burdick, *supra*, perhaps upon a legal presumption of negligence based upon the very fact of harboring. *Muller* v. *McKesson* (1878) 73 N. Y. 195; cf. *Card* v. *Case* (1848) 5 C. B. 622. Since the common carrier is not bound to transport wild animals, any more than dangerous articles, *California Powder Works* v. *Atlantic etc. Co.* (1896) 113 Cal. 329; *The Nitro-glycerine Case* (1872) 15 Wall. 524, 536; Hutchinson, Carriers, 3rd Ed., § 145, where no evidence indicating that he holds himself out as willing to carry them is present, cf. *Honeyman* v. *Oregon etc. Ry. Co.* (1886) 13 Or. 352; *Hinkley* v.

N. Y. Central etc. Ry. Co. (N. Y. 1874) 3 Thomp. & Cook 281, there is no logical foundation and seemingly no decision exempting him from the extraordinary liability attaching to harborers of such beasts. The majority's view of the law indicates a manifest reluctance to extend this strict liability to common carriers, proceeding from rather vague considerations of public policy. Apart from this, however, the decision may be sustained on the facts, as the plaintiff, though an infant, was concededly *sui juris* and wilfully heedless.

CARRIERS—NON-TRANSFERABLE TICKETS—INDUCING BREACH OF CONTRACT.—The defendant, a ticket scalper, dealt in non-transferable, reduced rate tickets to the injury of the plaintiff. *Held*, actionable as inducing breach of contract. *Bittermann* v. *L. & N. R. R. Co.* (1907) 28 Sup. Ct. 97.

The principal case affirms a similar holding in the federal, *Illinois Cent. Ry.* v. *Caffrey* (1904) 128 Fed. 777; *Nashville Ry. Co.* v. *McConnell* (1897) 82 Fed. 65, and state courts. *Konner* v. *Lake Shore R. R. Co.* (1903) 69 Oh. St. 339; *Schuback* v. *McDonald* (1903) 179 Mo. 163. It is a logical application of the view that inducing breach of contract is actionable, *Angle* v. *Chicago, St. Paul Ry.* (1893) 151 U. S. 1, to the principle that the conditions of non-transferable tickets bind all who acquire them. *Drummond* v. *So. Pac. Co.* (1891) 7 Utah 118; cf. *Mosher* v. *St. Louis R. R. Co.* (1887) 127 U. S. 390. The principal case is an interesting addition to the federal law of inducing breach of contract enlarging the *Angle* case, *supra*, in recognizing legal malice, *Chipley* v. *Atkinson* (1887) 23 Fla. 206, to be a sufficient foundation on which to ground an action, and in sustaining the plaintiff even though the defendant be guilty of no fraud or intimidation. *Raymond* v. *Yarrington* (1903) 96 Tex. 443; *Jones* v. *Stanley* (1877) 76 N. C. 355. Cases contra refuse to regard the inducement as actionable unless accompanied by other tortious conduct, *Raycorft* v. *Tayntor* (1890) 68 Vt. 219, or no fraud or intimidation was used. *Boyson* v. *Norris* (1893) 98 Cal. 578. Missouri is anomalous in affording no remedy for inducing the breach of any contractual relation except that of master and servant, *Glencoe Land Co.* v. *Hudson Bros.* (1897) 138 Mo. 439, in strong contrast with the modern conception that even though no contract subsists malicious instigation is actionable. *West Virginia Trans. Co.* v. *Standard Oil* (1902) 50 W. Va. 611.

CONSTITUTIONAL LAW—DISTRIBUTION OF POWERS—JUDICIAL AND ADMINISTRATIVE FUNCTIONS.—A statute allowed an appeal to the county tax board to the district court. *Held*, the statute was unconstitutional as imposing legislative or administrative duties on the court. *Silver* v. *Board of Com'rs* (Kan. 1907) 92 Pac. 604.

A statute allowed an appeal from county commissioners to a probate court and jury to determine the local assessment due from those benefited by the opening of a drain. *Held*, the statute was constitutional. *Shreves* v. *Gibson* (Kan. 1907) 92 Pac. 584.

A statute conferred on a court the power to review the orders of railroad commissioners. *Held*, it was constitutional. *State* v. *Mo. Pac. R. R.* (Kan. 1907) 92 Pac. 606.

There is a clear judicial question in the *Mo. Pac.* case since the legislature and the railroad commissioners have power only to make reasonable orders. *Reagan* v. *Farmers' Loan & Trust Co.* (1893) 154 U. S. 362. The *Shreves* and *Silver* cases involved the performance of only quasi-judicial duties, since the decision of the court would be subject to reversal by the legislature. *Auditor* v. *Atchison R. R. Co.* (1870) 6 Kan. 500. Such duties involving ministerial or legislative elements are frequently held proper for the courts if they require a considerable amount of judicial discretion. *Strikert* v. *Kelley* (N. Y. 1844) 7 Hill. 9; *Citizens' Savings Bank* v. *Greenburg* (1903) 173 N. Y. 215; 7 COLUMBIA LAW REVIEW 603. So in Kansas a judge may find as to the advisability of enlarging a city. *Callan* v. *City Junction* (1890) 43 Kan. 627; contra, *Galesburg* v. *Hawkins* (1874) 75 Ill. 153; *State* v. *Simmons* (1884) 32 Minn. 540. The degree of judicial discre-

tion involved in *Callan* v. *City Junction, supra,* is no greater than that required to determine the propriety of a tax assessment, and expediency rather than principle seems to distinguish the cases. Certainly as much discretion is required in the *Silver* as in the *Shreves* case, and the latter may be distinguished only on the ground that the duty was not imposed on the judge as such. *Intoxicating Liquor Cases* (1881) 25 Kan. 751. See *U. S.* v. *Ferreira* (U. S. 1851) 13 How. 40.

CONSTITUTIONAL LAW—POLICE POWER—UNPLEASANT SIGHTS.—A stage line displayed on the exterior of its stages large advertisements in brilliant colors. *Held,* since the advertisements could not be considered a public nuisance they could not be abolished under the police power. *Fifth Avenue Coach Co.* v. *City of New York* (1908) 38 N. Y. Law Jour. No. 95.

Sentimental or æsthetic consideration are not recognized as grounds for the exercise of the police power. *People* v. *Green* (1903) 85 N. Y. App. Div. 400; *Bill Posting Co.* v. *Atlantic City* (1904) 71 N. J. L. 72; *Chicago* v. *Gunning System* (1905) 214 Ill. 628. But it has been held that the power of eminent domain may be exercised by Congress to preserve a battleground, *United States* v. *Gettysburg Electric Ry.* (1895) 160 U. S. 668, or by a state to beautify a public square. *Attorney General* v. *Williams* (1899) 174 Mass. 476. It is generally held that a nuisance causes physical discomfort, mere offense to the taste or imagination being insufficient. Wood, Nuisance, 3rd Ed., § 801; *Kirchgraber* v. *Lloyd* (1894) 59 Mo. App. 59; *Woodstock etc. Ass'n* v. *Hager* (1896) 68 Vt. 488. But a case is reported by the secular press to have been decided in California holding that a disfiguring advertisement was as much a nuisance as an offensive odor. See 87 The Outlook 560, November 16th, 1907. If such a position were reached by the courts generally private property could be taken under the police power for æsthetic purposes. Legislatures and courts should be slow to constitute themselves tribunals to regulate public taste. See *Beistein* v. *Donnaldson Lithographing Co.* (1903) 188 U. S. 239. The principal case reiterates a wise and conservative doctrine.

CONTRACTS—ATTORNEY AND CLIENT—LIABILITY OF EXECUTOR.—The brother of the defendant's testator having been indicted, he employed the plaintiff, an attorney, to defend the brother, and agreed to pay his fee. The testator died, and the plaintiff thereafter performed legal services, securing an acquittal. *Held,* the fee could be recovered from the defendants as executors. *Barrett* v. *Towne* (Mass. 1907) 82 N. E. 698.

The employment of a lawyer is both a bilateral contract of service, and the creation of the relation of attorney and client. The status ceases on the death of the client, *Gleason* v. *Dodd* (Mass. 1842) 4 Met. 333, because death revokes the attorney's authority to act as agent, Huffcut, Ag., 2nd Ed., § 71, and it necessarily ceases on the death of the attorney. The contract for legal services and payment therefor, however, although subject to the implied condition of the attorney's continuing to live, Pollock, Con., 4th Ed., 374, 378, runs to the client's personal representatives to the extent of making them liable for fees earned. 2 Pars., Con., 9th Ed., *531; cf. *Kernochan* v. *Murray* (1888) 111 N. Y. 306. The client is the party for whom the attorney acts, Bouvier, Law Dict., 11th Ed., 234, but is not necessarily he who pays the fee. *Arnold* v. *Robertson* (N. Y. 1870) 3 Daly 298. Where, as in the principal case, the fee is not to be paid by the client, it is obvious that the death of either attorney or client will terminate the retainer, but death of the party who is to pay will have no such effect.

CONTRACTS—CERTAINTY—MUTUALITY.—A manufacturer agreed in writing to supply a dealer with as much cement as necessary to push the product, in consideration of the dealer's urging its sale. The dealer did push the product but the manufacturer refused to supply. *Held,* the contract lacked mutuality and was unenforcible; even if taken in connection with a conversation in which the dealer agreed to push and order. *Jackson* v. *Portland Cement Co.* (1907) 106 N. Y. Supp. 1052.

Where the quantity of a product agreed to be supplied or taken is measured by the needs of the buyer, the contract is everywhere good, if these needs lie within clearly defined limits. *Wells* v. *Alexandre* (1891) 130 N. Y. 642. Where the needs of the business are not defined, the buyer is at liberty to use more or less, so long as he observes good faith, and lives up to the legitimate requirements of the business, *Nat'l Furnace Co.* v. *Mfg. Co.* (1884) 110 Ill. 427; *Stover Carriage Co.* v. *Steel Co.* (1900) 105 Fed. 200, since these contracts should not be construed to leave one party subject to the caprice of the other. *Man. Oil Co.* v. *Lubricating Co.* (1902) 113 Fed. 923. Some courts, however, refuse to enforce the contract on the ground of lack of mutuality; *Bailey* v. *Austrian* (1873) 19 Minn. 535; and the same has been held where there is no agreement to buy. Cf. *Chicago etc. Ry. Co.* v. *Dane* (1870) 43 N. Y. 240. In the latter situation the proper theory looks on the transaction as a continuing offer by the seller to ripen into any number of contracts, but revocable as to contracts not yet made. Moreover in the principal case preferring the defendant's goods furnished valid consideration in a unilateral contract; and the oral bilateral contract was valid on the principle stated above. Cf. *Smith* v. *Morse* (1868) 20 La. Ann. 220; *Hickey* v. *O'Brien* (1900) 123 Mich. 611.

Copyright—Publication—Notice.—The plaintiff's assignor privately exhibited a painting, which bore no notice of copyright. It was, however, copyrighted by the plaintiff, who published photographic copies bearing the proper notice. The defendant infringed the copyright. *Held*, notice of copyright on the published copies only was sufficient. *Am. Tobacco Co.* v. *Werckmeister* (1907) 207 U. S. 284.

§ 4962, U. S. R. S., taken literally, would require notice of copyright to be inscribed on published copies of a book, but only on the original of a map, painting, etc. As the purpose of the notice is to warn the public, *Burrow-Giles Co.* v. *Sarony* (1884) 111 U. S. 53, such literal construction would defeat the legislative design, *Werckmeister* v. *Pierce & Bushnell Mfg. Co.* (C. C., Mass. 1894) 63 Fed. 445, and to prevent this the construction of the principal case had previously been adopted by the lower Federal courts. *Werckmeister* v. *Amer. Lithographic Co.* (C. C., S. D. N. Y., 1905) 142 Fed. 827. To this rule, however, should be added the limitation that if the original of any copyrighted work be in fact published, it, as well as the reproduced copies, should bear notice of copyright, to permit an action for its infringement. Cf. *Pierce & Bushnell Mfg. Co.* v. *Werckmeister* (C. C. A., 1st Circ., 1896) 72 Fed. 54.

Corporations—Dissolution—Real Property.—A manufacturing corporation became dissolved by expiration of the period for which it was chartered. The legislature then passed a statute re-enacting the charter and continuing the corporation for twenty years from the passage of the renewing act. *Held*, that upon dissolution the original grantor took the land by reverter, impressed with a trust, and that by the renewing act his title was divested, and the land re-vested in the corporation. *Diamond State Iron Co.* v. *Husbands* (Del. 1908) 69 Atl. 240. See Notes, p. 222.

Corporations—Receiver—Property *in Custodia Legis*.—A bill prayed for an injunction against, and the appointment of a receiver for, a corporation, on the ground of insolvency. An order was issued, restraining the company from selling or paying over any of its assets, and an order to show cause was served. Afterwards, but before the return day, a creditor of the corporation obtained a judgment and levied upon its personal property. Later, a receiver was appointed, who took possession of all the property. *Held*, the judgment creditor was entitled to priority of payment. *Squire* v. *Princeton Lighting Co.* (N. J. 1907) 68 Atl. 176. See Notes, p. 213.

Corporations—Ultra Vires—Implied Powers.—An action was brought by a corporation, engaged in running a stage line, to enjoin the city from interfering with advertisements displayed on the exterior of the stages. *Held*,

the act was ultra vires and relief should be denied. *Fifth Ave. Coach Co.* v. *City of New York* (1908) 38 N. Y. Law Jour. No. 95.

The general rule is that any act unauthorized or forbidden is ultra vires, 10 Cyc. 1146, and the more liberal doctrine in respect to private corporations, *Martin* v. *Niagara etc. Mfg. Co.* (1890) 122 N. Y. 165, would not here apply. Neither can it be said that an innocent person will suffer if the ultra vires act is not recognized, and therefore the authorities which give effect to ultra vires contracts when executed are not in point. *Vought* v. *Eastern B. & S. Assn.* (1902) 172 N. Y. 508, 517. But powers not expressly granted to public corporations may be implied in at least four cases: first, when necessary to carry on the business; *Brooklyn Heights Ry. Co.* v. *Brooklyn* (1897) 152 N. Y. 244; second, when conducive to the public's convenience; *Jacksonville R. R.* v. *Hopper* (1895) 160 U. S. 514, 526; third, when authorized by custom, *City of New York* v. *Interborough R. T. Co.* (1907) 53 Misc. 126, and fourth, when reasonably using facilities necessary to the main business. *Brown* v. *Winnisimmet Co.* (Mass. 1865) 11 Allen 326. No justification for advertising is found under the first two cases, and the court while admitting a custom of certain carriers to advertise distinguishes the principal case on the ground that there was no custom to advertise exteriorly. It is submitted that since no new facilities were employed a general power to advertise might be implied as an incident to the business.

Criminal Law—Estoppel—Embezzlement.—The appellant, a deputy assessor, charged with embezzlement, contended that because an irregularity in a tax payment prevented its acceptance by the county, the money misappropriated was held by him for the taxpayer, and not "in the course of his employment as such assessor." *Held*, since he received the money on the assumption of agency for the county, he was estopped to deny the agency. *People* v. *Robertson* (Cal. 1907) 92 Pac. 498.

As the State had not "changed its position," there is no estoppel by misrepresentation. The estoppel assumed is of the sort which in an action to recover money collected for the plaintiff forbids a denial of his right to receive it. Bigelow, Estoppel, 3rd Ed. 576; cf. *Placer County* v. *Astin* (1857) 8 Cal. 304; *Morris* v. *State* (1877) 47 Tex. 583. Its application in criminal law originated in Bishop's criticism of certain English cases on embezzlement, see 2 Bish. New Crim. Law § 365, which construed the statutory phrase, "by virtue of his employment," not to cover acts done against instructions, *Rex* v. *Snowley* (1830) 4 C. & P. 390; *Reg.* v. *Harris* (1854) 6 Cox C. C. 363, or without authority. *Rex* v. *Hawtin* (1836) 7 C. & P. 281. Earliest adopted in California, *Ex parte Hedley* (1866) 31 Cal. 109, and here often affirmed, *People* v. *Treadwell* (1886) 69 Cal. 226; *People* v. *Gallagher* (1893) 100 Cal. 466; *People* v. *Royce* (1895) 106 Cal. 173; it has also been recognized elsewhere, *State* v. *Spaulding* (1880) 24 Kan. 1; *Leonard* v. *State* (1879) 7 Tex. Ct. App. Rep. 417, 466, being used in several instances against the plea that the complainant was a foreign corporation which, not having complied with statutory requirements, was therefore prohibited from having "agents" in the state. *State* v. *O'Brien* (1894) 94 Tenn. 79; *Com.* v. *Shober* (1897) 3 Pa. Sup. Ct. Rep. 554; *State* v. *Pohlmeyer* (1899) 59 Oh. St. 491. A ruling in one such case that the statute embraced a *de facto* agency, *People* v. *Hawkins* (1895) 106 Mich. 479, indicates that Bishop's doctrine is a mere phrase for what is really statutory interpretation. Its use is unnecessary; and there is danger that it may induce a breach of the rule against the enlargement of a penal statute, by judicial construction, to include persons outside its descriptive terms though appearing within its reason and spirit. *U. S.* v. *Wiltberger* (1820) 5 Wheat. 76; *State* v. *Lovell* (1867) 23 Ia. 304; cf. *Moore* v. *State* (1898) 53 Neb. 831.

Criminal Law—Manslaughter—Neglect of Duty.—The deceased, while in a drunken debauch with the defendant, her paramour, took morphine, and in consequence of the defendant's neglect to summon medical aid she died. *Held*, the relation did not raise a duty of care so as to make the defendant criminally responsible. *People* v. *Beardsley* (Mich. 1907) 113 N. W. 1128.

Involuntary manslaughter may arise from an omission to perform a plain duty owing to the deceased, imposed either by law or by contract, where the death is the immediate and direct consequence of the non-feasance. *U. S.* v. *Knowles* (1864) 4 Sawy. 517; *Territ.* v. *Manton* (1888) 8 Mont. 95. Such a duty is imposed by the relation of husband and wife, *Reg.* v. *Plumber* (1844) 1 Car. & K. 600; *State* v. *Smith* (1876) 65 Me. 257; *Territ.* v. *Manton, supra,* or that of parent and child, *Gibson* v. *Com.* (1899) 106 Ky. 360; *Reg.* v. *Cook* (Eng. 1898) 58 Alb. L. J. 232, or where a person has undertaken to care for one that is helpless, *Reg.* v. *Instan* [1893] 1 Q. B. 450; *Reg.* v. *Nichols* (1875) 13 Cox C. C. 75, or where an analogous relation has been assumed by contract, *U. S.* v. *Freeman* (1827) Fed. Cas. 15162; *State* v. *O'Brien* (1867) 32 N. J. L. 169; *Reg.* v. *Lowe* (1850) 3 Car. & K. 123, but not in case where there is only a moral obligation. *U. S.* v. *Knowles, supra; Reg.* v. *Smith* (1869) 11 Cox C. C. 210; *Reg.* v. *Shephard* (1862) 9 Cox C. C. 123. The principal case is sound in refusing to extend the doctrine to those jointly engaged in wrongdoing.

EQUITY—RESCISSION—UNILATERAL ERROR OF LAW.—The plaintiff, though aware of all material facts, was ignorant of the resulting quantum of her interest in an estate. The defendant was acquainted with the plaintiff's error of law, but made no endeavor to rectify it. A suit was brought for rescission of the conveyance to the defendant. *Held,* equity would grant relief. *Faxon* v. *Baldwin* (Ia. 1907) 114 N. W. 40. See NOTES, p. 211.

EQUITY—SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY.—A contract for the purchase and sale of land provided that on default by the vendee the vendor was to retain the part of the purchase money paid, but to bring no action for damages or specific performance. *Held,* the vendee could not have specific performance because there was no mutuality in that the vendor had been barred from the remedy. *Wadick* v. *Mace* (1908) 38 N. Y. Law Jour. No. 105.

This decision is a blind application of the rule of mutuality, which is quite generally stated to be that if the contract, when entered into, is unenforcible in equity by one of the parties, it cannot be there enforced by the other. Fry, Spec. Perf., 4th Ed., §§ 460, 463; *Norris* v. *Fox* (1891) 45 Fed. 406. But in view of the numerous exceptions to the doctrine, see Fry, *supra,* §§ 464-476, and on principle, a better statement is, that equity will not enforce the defendant's promise where to do so would leave him with only an inadequate common law remedy for the non-performance of the plaintiff's agreement. Prof. J. B. Ames, 3 COLUMBIA LAW REVIEW 1; 1 Illinois Law Rev. 548. Although the vendor has a right of specific performance which is in the nature of a barring and foreclosure of the vendee's right to acquire the land, *Lewis* v. *Lechmere* (1721) 10 Mod. 503, 506; see *Clark* v. *Hall* (N. Y. 1839) 7 Paige Ch. 382, so that it might be a defense to a suit by the vendor, that the vendee has stipulated away his equitable remedy; yet as the vendee's right rests on the theory that land is unique and is in no wise dependent on the existence of a corresponding remedy for the vendor, such a stipulation, as here, ought not of itself to impair the vendee's right of specific performance. As the court could have enforced the plaintiff's side of the contract, the objection of want of mutuality should not have prevailed.

EVIDENCE—HEARSAY—INTERPRETER.—A witness had given evidence through an interpreter before the grand jury. In order to discredit a statement made by the witness at the trial, the testimony of a member of the grand jury was offered as to what witness had said through the interpreter. The grand juror did not understand the conversation between the witness and the interpreter. *Held,* the grand juror's testimony was hearsay and inadmissible. *Cervantes* v. *State* (Tex. 1907) 105 S. W. 499.

Where a person has selected his own interpreter he may be regarded as having made the interpreter his agent and the words of the latter are *prima facie* his own. *Commonwealth* v. *Vose* (1892) 157 Mass. 393; 1

Greenl. Evid. §§ 182, 183. Hence the words of the agent may be given in evidence as admissions against the principal where the latter is a party. Wigmore, Evid. §§ 1078 (6), 1810 (2); *Commonwealth* v. *Vose, supra.* But the inference of agency is regarded as by no means a necessary one and it has been stated that the correctness of the interpreter's statements must be shown. *Diener* v. *Diener* (1856) 5 Wis. 483. While it is true that the court should closely scrutinize the question of agency, it seems difficult if not entirely impracticable to go to the length suggested in *Diener* v. *Diener, supra,* without nullifying the rule. It seems that doubt as to the interpreter's truthfulness should affect the weight rather than the admissibility of the evidence. *Commonwealth* v. *Vose, supra,* 395. On the other hand, where an interpreter has been appointed in legal proceedings there is clearly no inference of agency; *Schearer* v. *Harber* (1871) 36 Ind. 536; 1 Greenl. Evid. § 183 (a); the interpreter is a witness merely to the words interpreted. *State* v. *Noyes* (1869) 36 Conn. 80; *Schearer* v. *Harber, supra;* Wigmore, Evid., § 1810 (1). This was his position in the principal case and the evidence of his testimony was equally hearsay whether offered against the witness to be impeached as directly or indirectly self-contradictory. The interpreter should have been called as a witness or his absence adequately explained.

INNKEEPERS—SUMMER RESORT—GUEST AND BOARDERS.—The plaintiff arranged with the proprietors to stop at their hotel situated at a summer resort. A reduced rate per week, but no definite time, was fixed. *Held,* the relation of innkeeper and guest was created, so that the proprietors were liable as insurers for the loss of valuables in the plaintiff's room. *Holstein* v. *Phillips & Sims* (N. C. 1907) 59 S. E. 1037.

Where the keeper of a public house professes to supply for hire the needs of travelers, persons who receive from him the entertainment for which they have occasion are *prima facie* guests, *Pinkerton* v. *Woodward* (1867) 33 Cal. 557, and this presumption continues until the contrary clearly appears. *Ross* v. *Mellin* (1887) 36 Minn. 421; *Jolie* v. *Cardinal* (1874) 35 Wis. 118. The fact that one has arranged to stay for a week or more, or has received a weekly instead of a daily rate does not overcome it, *Beale* v. *Posey* (1882) 72 Ala. 223; *Pinkerton* v. *Woodward, supra; Pope* v. *Mulenbacker* (1904) 136 Mich. 611, but a contract for both a definite and a protracted stay, in return for which a special rate is given, is the strongest evidence that one is a boarder and not a guest. *Moore* v. *Long Beach Development Co.* (1891) 87 Cal. 483; *Schoecraft* v. *Bailey* (1868) 25 Ia. 553; *Crapo* v. *Rockwell* (1905) 94 N. Y. Supp. 1122. Even where the rate is fixed in expectation of a person's protracted stay, if his profession calls for such unexpected and frequent change of location that he must live with those who provide for travelers, he is necessarily a guest. *Hancock* v. *Rand* (1883) 94 N. Y. 1. Where a hotel keeper at a summer resort holds himself out to the general public, his house does not lose the nature of an inn because the guests are likely to stay longer on account of exceptional attractions; and nothing appeared in the principal case to rebut the presumption that the relation of innkeeper and guest existed.

INSURANCE—REPUDIATION BY INSURER—DAMAGES.—The defendant wrongfully refused to accept a premium, and claimed a forfeiture of the policy. The plaintiff sued for damages. *Held,* the life continuing insurable, the measure of damages was the difference in cost of the old insurance and a new policy, adding profits, but allowing the insurer compensation for the risk already run. *Krebs* v. *Security Trust & Life Ins. Co.* (1907) 156 Fed. 294.

There is a tendency not to apply the illogical doctrine of anticipatory breach to insurance contracts; 6 COLUMBIA LAW REVIEW 589; yet many courts give an action on refusal of the insurer to continue the policy, for damages upon rescission, cf. *Day* v. *Conn. Ins. Co.* (1878) 45 Conn. 480, or upon an anticipatory breach, *Am. Ins. Co.* v. *McAdam* (1885) 109 Pa. St. 399, or where the equitable remedy of reinstatement, *Meyer* v. *Knicker-*

bocker Trust Co. (1878) 73 N. Y. 516, would work hardship. *N. Y. Life Ins. Co.* v. *Statham* (1876) 93 U. S. 24 (intervention of civil war). There is a conflict regarding the measure of damages. Some courts adopt the rule of the principal case, *Universal Ins. Co.* v. *Binford* (1887) 76 Va. 103; *Ebert* v. *Mutual R. F. L. Assn.* (1900) 81 Minn. 116, 128, and if the life is no longer insurable give the equitable value of the policy as of the time of its dissolution. *Smith* v. *Ins. Co.* (1876) 64 Mo. 330; *Speer* v. *Phoenix Ins. Co.* (N. Y. 1885) 36 Hun 322. Other courts hold that the insured may recover the premiums paid with interest from the time of each payment, *Ala. Ins. Co.* v. *Garmany* (1884) 74 Ga. 51, or according to the exigencies of each case, *Am. Ins. Co.* v. *McAdam, supra,* allowing the insurer no compensation for the risk it has run. *Van Werden* v. *Assurance Co.* (1896) 99 Ia. 621. The measure adopted in the principal case is substantially the equitable value, which, since the action is based upon a rescission in the sense of cancellation, rather than upon an anticipatory breach, is the correct one.

Master and Servant—Liability for Servant's Wilful Tort.—The defendant's engineer, while operating his private tramway, wilfully blew the whistle to frighten the plaintiff's mule which resulted in the plaintiff's injury. *Held,* Connor and Walker, JJ., dissenting, the defendant was liable. *Stewart* v. *Cary Lumber Co.* (N. C. 1907) 59 S. E. 545.

Ordinarily the master is liable only for those torts of his servant committed within the scope of the employment and for the master's benefit. *McClung* v. *Dearborne* (1890) 134 Pa. St. 396; *Mott* v. *Consumer's Ice Co.* (1878) 73 N. Y. 543; *Skipper* v. *Clifton Mfg. Co.* (1900) 58 S. C. 143. But where an engineer on an authorized run, *Cousins* v. *Hannibal etc. Ry.* (1898) 92 Tex. 288, wilfully mishandles the locomotive, *New Orleans etc. Ry.* v. *Allbritton* (1859) 38 Minn. 242, 277, lets off steam, *Toledo etc. Ry. Co.* v. *Harmon* (1868) 47 Ill. 298, blows the whistle, *Chicago etc. Ry.* v. *Dickson* (1872) 63 Ill. 151, even where required by statute; *Bittle* v. *Camden etc. R. R. Co.* (1893) 55 N. J. L. 615; the exigencies of the public safety, *Nashville etc. Ry.* v. *Starnes* (Tenn. 1871) 9 Heisk. 52, or the ownership of the dangerous instrumentality, *Pa. & Reading Ry.* v. *Derby* (U. S. 1852) 14 How. 468, are held to necessitate a stricter rule of responsibility. See cases *supra;* contra, *Stevenson* v. *Southern Pacific* (1892) 93 Cal. 558; *Cooke* v. *Illinois Central* (1879) 30 Ia. 202. While this is an innovation on the older doctrine, cf. *M'Manus* v. *Crickett* (Eng. 1801) 1 East. 106, it would seem to be in accord with the modern tendency to extend the master's responsibility to acts naturally flowing from the employment though not within its scope. Cf. *Ruddiman & Co.* v. *Smith* (1889) 60 L. T. Rep. N. S. 708.

Municipal Corporations—Contract for Patented Pavements.—The defendant advertised for bids for a pavement to be laid by the plaintiff's patent method or by two other unpatented methods producing a similar pavement. *Held,* this afforded the opportunity for competition required by law. *Warren Bros. Co.* v. *New York* (N. Y. 1907) 83 N. E. 59.

Where a city must award contracts for public improvements to the lowest bidder, and yet it contracts for a patented article some jurisdictions hold the contract void because no fair competition can be had, *Burgess* v. *City of Jefferson* (1869) 21 La. Ann. 143; *Dean* v. *Charlton* (1869) 23 Wis. 590, or on the ground that property owners are deprived of their statutory rights. *Nicholson Pavement Co.* v. *Painter* (1868) 35 Cal. 699; cf. *Kansas City Trans. Co.* v. *Huling* (1886) 22 Mo. App. 654. Entering into such a contract, or the levy of a tax under it, may be enjoined. *Dolan* v. *New York* (N. Y. 1868) 4 Abb. Pr. N. S. 397. Other jurisdictions hold such a contract valid, on the theory that the bidder may obtain the patentee's license, *Hobart* v. *Detroit* (1868) 17 Mich. 246, or that the improvement is within the general power of the city and the statute does not apply. *Matter of Dugro* (1872) 50 N. Y. 13; *Barber Asphalt Paving Co.* v. *Hunt* (1889) 100 Mo. 23. Under either rule, if any bidder is licensed to use a patent, *Hastings* v. *Columbus* (1885) 42 Oh. St. 585; *Kilvington* v. *Superior* (1892) 83 Wis. 222, or

various methods, patented or otherwise are specified, the contract is valid as there is proper competition. *Barber Asphalt Paving Co.* v. *Gogreve* (1889) 41 La. Ann. 251, 261. The principal case is within this consideration.

MUNICIPAL CORPORATIONS—TORT LIABILITY—MANAGEMENT OF BUILDINGS.—The plaintiff was injured by the negligent operation of an elevator in a police station. *Held*, Haight, J., dissenting, the maintenance of a police station was a governmental function for the negligent discharge of which the defendant city was not liable. *Wilcox* v. *The City of Rochester* (1907) 38 N. Y. Law Jour. No. 70.

The principal case exemplifies the well-settled rule that a municipal corporation while liable for torts committed in the exercise of a private function is not amenable for those occurring in the performance of a public duty. Burdick, Torts, 106. As to what is a corporate function courts differ. Concededly the preservation of the peace is a purely public function, *Gray* v. *Mayor of Griffin* (1900) 111 Ga. 261, and it is held that when the city maintains a jail, *Hite* v. *Whitley County Court* (1891) 91 Ky. 168; *Brown* v. *Town of Guyandotte* (1890) 34 W. Va. 299, or a police station, *Kelley* v. *Cooke* (1898) 21 R. I. 29, it is performing such a function. No distinction is drawn between torts committed by an officer, *Gallikson* v. *McDonald* (1895) 62 Minn. 278, and negligence in maintaining property, *Snyder* v. *City of St. Paul* (1892) 51 Minn. 466, except when the building is used for private purposes. *Worden* v. *New Bedford* (1881) 131 Mass. 223. It is contended by some that the ownership of property entails the obligation of care from which even a city is not exempt, *Briegel* v. *Phila.* (1896) 135 Pa. 451, irrespective of whether the use be public or private. Jones, Neglig. Municip. Corp., 305 et seq.; Goodnow, Municipal Home Rule, 150 et seq. Of the cases cited in support of this contention the majority are distinguishable because either the question was not raised, *Galvin* v. *Mayor* (1889) 112 N. Y. 223, or the liability is based on another ground, *Carrington* v. *St. Louis* (1886) 89 Mo. 208 (duty to keep sidewalks clear), or controlling cases are misconstrued, *Chicago* v. *Dermody* (1871) 61 Ill. 431, or the question was assumed, *McCaughrey* v. *Tripp* (1879) 12 R. I. 449, or are apparently overruled, *Sullivan* v. *Holyoke* (1883) 135 Mass. 73; cf. *Kelley* v. *Boston* (1904) 186 Mass. 165, or proceed upon erroneous considerations. *Edwards* v. *Pocahontas* (1891) 47 Fed. 268. Assuming the theoretical validity of this view, which appears to be open to doubt, it seems that the application of this doctrine would create more confusion than its adoption would justify.

NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER—KNOWLEDGE OF COLLATERAL AGREEMENTS—CONSIDERATION.—A bank, knowing that a note was given in consideration of an executory agreement, discounted it and gave the indorser credit on its books for the amount. *Held*, knowledge of the collateral agreement was not fatal unless there was also knowledge of the breach of the agreement; but merely crediting the depositor did not constitute the bank a *bona fide* holder for value. *McKnight* v. *Parsons* (Ia. 1907) 113 N. W. 858.

The current of authority is in accord with the principal case on both propositions. Notice of the failure of consideration must be brought home to the holder before he becomes a purchaser to defeat recovery; *Bank* v. *Cason* (1887) 39 La. Ann. 865; *Davis* v. *McCready* (1858) 17 N. Y. 230; *Borden* v. *Clark* (1873) 26 Mich. 410; or if only part has been paid when notice is given the holder is protected *pro tanto*. *Dresser* v. *Missouri Const. Co.* (1876) 93 U. S. 92. But when a bank only credits the amount of the note it has not parted with value or changed its position, *Bank* v. *Green* (1906) 130 Ia. 384; *Bank* v. *Blue* (1896) 110 Mich. 31; *Bank* v. *Valentine* (N. Y. 1879) 18 Hun 417, and is not a purchaser for value until the credit thus given is exhausted. *Bank* v. *Blue, supra.* This seems sound as it can at any time on receiving notice cancel the credits and tender back the note. *Thompson* v. *Sioux Falls Bank* (1893) 150 U. S. 231, 244; *Bank* v. *Huver* (1886) 114 Penn. 216.

NEGOTIABLE INSTRUMENTS—JOINT STOCK ASSOCIATION BONDS—EXEMPTION OF SHAREHOLDERS LIABILITY.—The plaintiff sought to recover coupons of a stolen bond issued by the Adams Express Co., from the defendant, an innocent purchaser for value. The bond contained the stipulation that no shareholder should be liable thereon as partner or otherwise. *Held*, the bond was negotiable, and the plaintiff should recover. *Hibbs* v. *Brown* (N. Y. 1907) 82 N. E. 1108. See NOTES, p. 215.

PARTNERSHIP—EQUITABLE CONVERSION OF FIRM REALTY—RIGHTS OF THE HEIR OF A DECEASED PARTNER.—A., B., and C. were partners in a canning business. On A.'s death B. and C. bought in the plant at a sale ordered by a court of equity on their *ex parte* petition alleging that the state of the partnership affairs made a sale necessary. After the sale, but before its confirmation, A.'s administrator intervened and acquiesced in the irregularity of such a purchase by the surviving partner. Later A.'s heirs set up that as a portion of the property was realty, they should have been served. *Held*, the heirs were not parties in interest. *French* v. *Vanatta* (Ark. 1907) 104 S. W. 141. See NOTES, p. 208.

PERSONAL PROPERTY—ESTOPPEL—OSTENSIBLE OWNERSHIP.—Chattels sold to the defendant were left in the possession of the vendor, who transferred them to the plaintiff for value. The defendant took possession, and replevin was brought. *Held*, he was not estopped to deny his title. *Huell-Mantel* v. *Tweddle* (Mich. 1907) 114 N. W. 212.

The bare possession of personal chattels without some other evidence of property, or of authority from the owner to sell, does not enable the possessor to transfer a better title than he himself has. *Diebolt* v. *Canal Boat* (1880) 4 Fed. 571; *Nichols* v. *Monjeau* (1903) 132 Mich. 582; *Johnson* v. *Frisbie* (1868) 29 Md. 76. To raise an estoppel there must have been an overt act, upon which the third party relied, *Van Horne* v. *Overman* (1888) 75 Ia. 421, committed by the owner either with the view to inducing the third party to alter his position or knowing as a reasonable man that this would occur. *Knights* v. *Wiffen* (1870) L. R. 5, Q. B. 660; *McNeil* v. *10th Nat'l Bank* (1871) 46 N. Y. 325. Thus in the case of a silent acquiescence misleading a party to his disadvantage, there must have been occasion and duty to speak, *Thompson* v. *Simpson* (1891) 128 N. Y. 270, with knowledge that the third party would probably rely on silence to his injury. 5 COLUMBIA LAW REVIEW 473. In some jurisdictions the reasonableness of the act and the element of knowledge are disregarded, and an authorized retention of possession by the vendor estops the owner from ascertaining title against a subsequent *bona fide* purchaser. *Webster* v. *Peek* (1863) 31 Conn. 495; *Stephens* v. *Gifford* (1890) 137 Pa. 219; *Davis* v. *Bigler* (1869) 62 Pa. 247. The plaintiff in the principal case had no reason to suppose that his vendor was attempting to resell the goods, nor knowledge that his silence was likely to mislead the defendant. The decision seems clearly in accord with the weight of authority.

PLEADING AND PRACTICE—INHERENT POWER OF PHYSICAL EXAMINATION.—In a suit for permanent personal injury, the defendant requested a physical examination of the plaintiff by competent physicians to be appointed by the court. *Held*, the trial judge had a discretionary power on a proper showing to order an examination. *City of Cedartown* v. *Brooks* (Ga. 1907) 59 S. E. 836.

At common law there is no mention of the power, *U. P. Ry. Co.* v. *Botsford* (1890) 141 U. S. 250, but starting with *Walsh* v. *Sayre* (N. Y. 1868) 52 How. Pr. 334, courts began to hold it inherent, until to-day this is the holding of the majority. 2 Sutherland, Damages, 3rd Ed., 451. The power is held discretionary, *Schroeder* v. *R. R. Co.* (1877) 47 Ia. 375; *R. R. Co.* v. *Childress* (1899) 82 Ga. 719, and the examination must be reasonable and proper, *Shephard* v. *Ry. Co.* (1885) 85 Mo. 629; *Turnpike Co.* v. *Baily* (1881) 37 Ohio St. 104, necessary, *Sibley* v. *Smith* (1885) 46 Ark. 275,

under the control of the court, *Belt Co.* v. *Allen* (1898) 102 Ky. 551, and by competent experts. *Ala. R. R. Co.* v. *Hill* (1890) 93 Ala. 514. An examination will not be ordered if anæsthetics must be used, *Studgeon* v. *Sand Beach* (1895) 107 Mich. 496, or if there is any danger to life or health, *Belt Co.* v. *Allen, supra,* or if any serious pain will result; *R. R. Co.* v. *Allen* (1889) 90 Ala. 71; but if the plaintiff refuses, in a proper case, to submit to the examination, he will be non-suited. *Wanek* v. *Winona* (1899) 78 Minn. 98. Various theories are advanced to show that the power is inherent and that policy favors its exercise is shown by the current of legislation; cf. N. Y. Code Civ. Pro. §§ 872, 873; but on principle it would seem that it does not exist in the absence of statutory authority. *McQuigan* v. *R. R. Co.* (1891) 129 N. Y. 51; *U. P. Ry. Co.* v. *Botsford, supra; Stack* v. *R. R. Co.* (1900) 177 Mass. 155.

Public Service Companies—Valuation of Property.—A municipality entered into a contract to purchase a street railway when it should be constructed. *Held,* the price paid should be the value as a structure, including its value as a going concern, but excluding the franchise. *Mayor etc. of Dudley* v. *Dudley etc. Ry. Co.* (1907) 97 L. T. Rep. N. S. 556. See Notes, p. 217.

Real Property—Vendor's Lien—Agreements to Support.—A mother conveyed land to her daughter reserving the right to support upon the land to the daughter's family. The daughter died and the mother inherited a life estate in the charged estate. *Held,* the mother's grantee acquired a lien chargeable against the remainderman for the reasonable value of the maintenance. *Tucker* v. *Tucker* (1907) 106 N. Y. Supp. 713.

An agreement to support the vendor of realty to be specifically enforcible against the land, must be expressly reserved in the deed, *Pownall* v. *Taylor* (Va. 1839) 10 Leigh 172; *Wilson* v. *Wilson* (1854) 38 Me. 18; *Gallagher* v. *Herbert* (1886) 117 Ill. 160, for owing, largely, to the law's antipathy to secret liens, *McCandlish* v. *Keen* (Va. 1857) 13 Gratt. 615; *Heist* v. *Baker* (1865) 49 Pa. St. 9, an implied lien for the unpaid purchase price does not arise when the collateral covenants of the vendee are the considerations for the conveyance, *Arlin* v. *Brown* (1862) 44 N. H. 102; *Meigs* v. *Dimock* (1827) 6 Conn. 458, nor when the consideration is such that the amount of the lien cannot be accurately stated. *Peters* v. *Tunell* (1890) 43 Minn. 473; *Hiscock* v. *Norton* (1879) 42 Mich. 320. When the lien is reserved it is equivalent to an equitable mortgage, *Kirk* v. *Williams* (1883) 24 Fed. 437; *Gordon* v. *Rixey* (1882) 76 Va. 694, charging the entire fee irrespective of later partition, cf. *Commons* v. *Commons* (1888) 115 Ind. 162, 168, and giving constructive notice to all in the chain of title. *Deacon* v. *Taylor* (1876) 53 Miss. 697. Texas, contra, holds that a reserved vendor's lien vests superior title in the vendor. *Webster* v. *Munn* (1889) 52 Tex. 416. Since, if the lien is reserved the rights of the parties depend on their contract, the performance of any covenant may be charged against the land. *Harvey* v. *Kelley* (1867) 41 Miss. 490; *Warford* v. *Hawkins* (1897) 150 Ind. 489; *Chase* v. *Peck* (1860) 21 N. Y. 581. While there is confusion as to the assignability of an implied vendor's lien, Pomeroy, Eq. Jur. § 1254, it is settled that a reserved lien is enforcible by an assignee. *Ober* v. *Gallagher* (1876) 93 U. S. 199. In the principal case, after the death of the daughter the contract was no longer specifically enforcible, *Campbell* v. *Potter* (1893) 147 Ill. 576, and the mother became entitled to the reasonable cost of her support, *Ralphsnyder* v. *Ralphsnyders* (1890) 17 W. Va. 28, which was chargeable against the entire fee, irrespective of the inheritance of the mother, cf. *Commons* v. *Commons, supra,* and her assignee was correctly given the value of her maintenance.

Receivers—Bond—Conclusiveness Against Sureties of Judgment Against Receiver.—An action was brought on a receiver's bond, conditioned that he should faithfully discharge his duties as receiver. A judgment had been recovered against the receiver, but no accounting had been taken nor had

the sureties received any notice. *Held*, the sureties were not concluded by the judgment. *Coe* v. *Patterson* (1907) 106 N. Y. Supp. 659.

Where an accounting has been taken and the sureties have had an opportunity to intervene, they are concluded by the prior adjudication. *Commonwealth* v. *Gould* (1875) 118 Mass. 300; *Ball* v. *Chancellor* (1885) 47 N. J. L. 125. An accounting is necessary to establish the receiver's inability to pay, and hence the sureties' liability; *French* v. *Dauchy* (1892) 134 N. Y. 543; and notice to the sureties is needed to render the judgment admissible in the action on the bond, there being no privity between the receiver and the sureties. *Douglas* v. *Howland* (1840) 24 Wend. 35. The principal case is clearly sound; and it seems that the decisions in apparent conflict properly rest upon the peculiar nature of the bond in suit—as in the actions on administrator's bonds, *Deobold* v. *Opperman* (1888) 111 N. Y. 531, which are conditioned upon the performance of orders of the surrogate—or the precise wording of the particular obligation, whereby extraordinary liability is assumed. *Douglas* v. *Ferris* (1893) 138 N. Y. 192.

STATUTES—NEW YORK USURY LAW—STATE BANK NOT A BONA FIDE HOLDER.—The defendant made a promissory note for a usurious consideration which a state bank discounted with notice of the usury, and upon which the bank's receiver brought suit. *Held*, as the bank took with notice of the usury it could not recover. *Schlesinger* v. *Lehmaier* (Ct. of App., 1908) 38 N. Y. Law Jour. No. 106.

In *Schlesinger* v. *Gilhooly* (1907) 189 N. Y. 1, it was decided that a state bank taking without notice a note void at its inception for usury, may recover thereon, three judges holding this to be a necessary implication from the silence of Congress on this point, basing this implication on the sole ground that that body has the power to legislate for national banks, and has in fact declared usurious contracts, to which such a bank is a party, to be valid, U. S. R. S. §§ 5197, 5198, which legislation has been followed by the state to put state banks on an equality with national banks. N. Y. Banking Law § 55. Three judges held the above construction of the statutes unwarranted, and that such interpretation would make them to that extent unconstitutional. The remaining judge agreed in allowing recovery, reaching this result, however, purely upon his interpretation of the Negotiable Instruments Law. This decision is recognized in the principal case as settled law, although it creates the possibility in New York of the validating of a previously void instrument by its transfer to a bank. See 6 COLUMBIA LAW REVIEW 519. The principal case holds, however, that the previous decision goes far enough in "safeguarding" the banks, and that good faith under such circumstances is necessary to recovery. When the sole express intention of the federal statute was to validate usurious contracts made by national banks, an intention generally to "safeguard" should not be implied from the silence on the point of indorsement. To confine the statute to its expression would avoid judicial speculation as to the necessary extent of the "safeguarding" when in conflict with state policy.

STATUTES—MECHANIC'S LIEN—RIGHTS OF SUBCONTRACTOR.—An owner paid subcontractors who were entitled to, but did not, file liens. An action was brought by another subcontractor to enforce his lien. *Held*, the owner was entitled to the same credit as if the liens of the paid subcontractors had been filed. *Fossett* v. *R. I. Lumber & Mfg. Co.* (Kan. 1907) 92 Pac. 833.

The Kansas statute, giving a lien directly on the property, is based upon the principle underlying the so-called Pennsylvania system of protecting mechanics and materialmen; *Hunter* v. *Truckee Lodge* (1879) 14 Nev. 24, 41; but it borrows from the so-called New York system the rule that the aggregate of liens is limited in amount to the principal contract price. *Hotel Co.* v. *Hardware Co.* (1896) 56 Kan. 448; *Gibson* v. *Lenane* (1883) 94 N. Y. 183; *Mantonya* v. *Reilly* (1900) 184 Ill. 183. Thus, while not going to the extent of the New York system in limiting further the fund available for subcontractors' claims to that part of the contract price unpaid

to the contractor when the claims are filed, *Van Clief* v. *Van Vechten* (1892) 130 N. Y. 571; *Gibson* v. *Wheeler* (1895) 110 Cal. 243; the contract price *in toto* is established as such a fund. *Clough* v. *McDonald* (1877) 18 Kan. 114. If the cost exceeds the contract price, the subcontractors take their *pro rata* share and the owner is entitled to a credit of that amount where he has paid in full the claim of a subcontractor who has filed a lien. *Chicago Lumber Co.* v. *Allen* (1894) 52 Kan. 795; *Smalley* v. *Gearing* (1899) 121 Mich. 190. But the filing of the lien is merely a remedy for the enforcement of a right already vested in the lienor, *Nixon* v. *Cydon Lodge* (1896) 56 Kan. 298; *Central Trust Co.* v. *Richmond etc. R. Co.* (1895) 68 Fed. 90, and the argument that when this claim has been satisfied without resort to the remedy, no credit should be given the owner, on the supposition that the remedy might not have been invoked and the claim thereby lost, seems "palpably unjust" and to rest on truly "technical grounds." And see *Dunlop* v. *Kennedy* (Cal. 1893) 34 Pac. 92; *Central Trust Co.* v. *Richmond etc. R. Co., supra.*

SURETYSHIP—STATUTE OF FRAUDS—ORIGINAL OBLIGATION.—A sub-contractor threatened to stop work, pursuant to a condition in the contract, because the contractor had failed to make a stipulated payment; whereupon the owner promised to pay him upon completion of the work. *Held*, this was not a special promise to answer for the debt or default of another. *Sinkovitz* v. *Applebaum* (1907) 107 N. Y. Supp. 122.

Forbearance to sue, though good consideration, *Thomas* v. *Delphy* (1870) 33 Md. 373, is insufficient to take an agreement to pay another's existing debt out of the statute. *Riegelman* v. *Focht* (1891) 141 Pa. St. 380; *Gillfillan* v. *Snow* (1875) 51 Ind. 305; contra, *Stewart* v. *Hinkle* (1851) Fed. Cas. 13,430 (where this distinction was overlooked). But where the promisor has an interest in property affected, *Mitchell* v. *Griffin* (1877) 58 Ind. 559, or in the agreement, *Davis* v. *Patrick* (1891) 141 U. S. 479, or its object is to benefit him, *Emerson* v. *Slater* (U. S. 1859) 22 How. 28, 43; *Bailey* v. *Marshall* (1896) 174 Pa. St. 602, or if he has derived an actual benefit; *White* v. *Rintoul* (1888) 108 N. Y. 222; his promise, though incidentally to pay another's debt, is not within the statute. *Nelson* v. *Boynton* (Mass. 1841) 3 Met. 396, 400; *Clark* v. *Jones* (1887) 85 Ala. 127. Opposed to this authority are cases like *Stewart* v. *Hinkle, supra*, which effectually nullifies the statute; and *Dillaby* v. *Wilcox* (1891) 60 Conn. 468, which requires the release of the original debtor. On authority the principal case seems sound; but it must be distinguished from a promise to indemnify, in reliance upon which a debt has been contracted. *Leonard* v. *Bredenburgh* (N. Y. 1811) 8 John. 29; 2 COLUMBIA LAW REVIEW 104.

TRADE-MARKS AND NAMES—UNFAIR COMPETITION—MISREPRESENTATION BY PLAINTIFF.—The plaintiff had by purchase merged with his own newspaper another called "St. Louis Grocer and General Merchant" which he ceased to publish but which he nevertheless listed with advertising agencies. The defendant then called his newspaper "Eli Grocer and General Manager." *Held*, no trade-mark could be claimed by the plaintiff, as the name was dissociated from any vendible commodity, and equity would not relieve from unfair competition because of misrepresentation of the paper as a going concern. *Grocers' Journal Co.* v. *Midland Pub. Co.* (Mo. 1907) 106 S. W. 310.

The name of a periodical or newspaper can be a trade-mark, *Gannert* v. *Rupert* (1904) 127 Fed. 962; Browne, Trade-Marks, 2nd Ed., § 115, though the name in the principal case may be open to the objection with regard to geographical, generic or descriptive words. 6 COLUMBIA LAW REVIEW 349. Assuming otherwise there seems insufficient evidence of abandonment. Hopkins, Unfair Trade, § 60. It is doubtless the rule that no trade-mark can exist as such apart from a vendible commodity, *McAndrews* v. *Bassett* (1864) 4 De Gex, J. & S. 380; *MacMahan Co.* v. *Denver Co.* (1901) 113 Fed. 468; Browne, Trade-Marks, *supra*, §§ 129-130, 301-302, but it did not appear that back numbers of the periodical were not purchasable, and plain-

tiff's intention not to abandon was clear in spite of lapse of time. See Browne, Trade-Marks, *supra*, § 681. The court, however, bases its decision chiefly on the doctrine of unfair trade, regardless of the existence of a technical trade-mark or of the fact of abandonment. Equity will not grant relief where the plaintiff has himself deceived the public by false representations. 8 COLUMBIA LAW REVIEW 40; *Manhattan Co.* v. *Wood* (1883) 108 U. S. 218; *Worden* v. *Cal. Fig Syrup Co.* (1903) 187 U. S. 516. It is difficult to perceive how actual injury could have resulted to the public from plaintiff's representations, but that consideration does not affect equity's refusal to act, 8 COLUMBIA LAW REVIEW 40, so long as the misrepresentations are not mere exaggeration or "puffing."

TRUSTS—BREACH OF ORAL AGREEMENT—CONSTRUCTIVE TRUSTEE.—A son accepted a conveyance of land, agreeing orally that after his father's, the grantor's death, he would deed it to his sisters. After his father's death, he refused, and pleaded the Statute of Frauds. *Held*, equity would raise a constructive trust for the beneficiaries. *Hilt* v. *Simpson* (Ill. 1907) 82 N. E. 588.

The violation of a parol promise to hold in trust is a mere breach of contract and not a fraud against which equity will relieve. *Patton* v. *Beecher* (1878) 62 Ala. 579. In some jurisdictions the consideration, i. e., the land, will be restored, *Ryan* v. *Dox* (1866) 34 N. Y. 307, but the beneficiary is helpless. The principal case refers to *Stahl* v. *Stahl* (1905) 214 Ill. 131 for its *ratio decidendi*. There, the "fiduciary or confidential relation" of the parties was emphasized; but the facts fail to disclose such relation. There were no active measures taken to secure the position; there was nothing except assent to act and confidence reposed. Every grantor has that confidence in the prospective trustee. The court might, since the grantor was on her deathbed, have applied the rule which obtains in cases of devise, *Norris* v. *Frazer* (1869) L. R. 15 Eq. Cas. 318, where the beneficiary is allowed to enforce the oral trust. See *Ahrens* v. *Jones* (1902) 169 N. Y. 555. *Stahl* v. *Stahl, supra*, is directly opposed to *Lantry* v. *Lantry* (1869) 51 Ill. 458, to which the court did not refer. See 6 COLUMBIA LAW REVIEW 326.

WATERS AND WATERCOURSES—PERCOLATING WATERS—RIGHT TO PUMP.—The plaintiff owned a mineral spring the flow from which was directly affected by the defendant's use of a steam rotary pump to obtain water on his land. Both parties were selling the water. *Held*, an injunction would issue. *Hathorn* v. *Dr. Strong's Saratoga Springs Sanitarium* (1907) 106 N. Y. Supp. 553.

The rule established by *Chasemore* v. *Richards* (1859) 7 H. L. Cas. 349, that an owner has an absolute right to take percolating waters, cf. *Ballard* v. *Tomlinson* (1885) 25 Ch. D. 115, has been overthrown in New York by *Forbell* v. *City of Brooklyn* (1900) 164 N. Y. 522, which limits the owner to the use of the water for the beneficial enjoyment of the land. There is no liability, however, to one making the same use of the water. *Merrick Water Co.* v. *City of Brooklyn* (1898) 32 App. Div. 454. Liability in the principal case must depend solely, therefore, on the ground that the percolation was induced by pumping. It is true that *Acton* v. *Blundell* (1843) 12 M. & W. 324, can be considered to apply only to water percolating naturally through the land; and the reason there stated for the extraordinary rule as to percolating waters, viz., the difficulty of determining the effect of a proposed diversion, does not exist here to the same extent. On the other hand, where the doctrine of reasonable user prevails, it would seem better policy to allow the obtaining of the water in the most economic way, in order not to restrict its application to justifiable uses. Cf. *Clarke County* v. *Lumber Co.* (1902) 80 Miss. 535.

BOOK REVIEWS.

CHARLES S. BULKLEY, *Editor-in-Charge.*

HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS. By WILLIAM L. CLARK, JR. Second Edition. By FRANCIS B. TIFFANY. St. Paul: West Publishing Company. 1907. pp. xvi, 721.

In view of the general success of this work it is not surprising to find that the publishers, in producing a new edition, have chosen not to depart from the general arrangement and scope of the previous volume. The aim has apparently been to bring the work down to date by the addition of citations, making changes in the text only where such changes were rendered necessary by the more recent cases.

The space required for these additions has induced several changes of form, the most noticeable of which is in the Black Letter headings to the chapters and sections. The large type of the first edition has been replaced by much smaller, heavy faced characters which occupy less room without detracting from either the appearance or the value of these outline summaries, which have been one of the distinctive features of the Hornbook series. Very frequently, also, the headings, by condensation, have been brought into closer accord with their character as synopses of the text matter. The text itself has been condensed in places, and occasionally the old notes have been shortened. In addition to this the index has been revised and the monograph on "The Logical Conception of a Corporation" eliminated. The result is a volume containing a large amount of new matter, yet with fewer pages than its predecessor.

Although, as already indicated, the body of the text remains undisturbed, it has been altered in many important particulars to correspond with the development of the last ten years in the law of corporations. It has been found necessary to revise the sections dealing with such subjects as Partnership Liability of Incorporators, Construction of Charters, Ultra Vires Acts, Ratification by Stockholders, Exemplary Damages and Residence of Interstate Corporations. One of the most important revisions, relating to the enforcement in foreign jurisdictions of the Statute of Limitations, and of Statutory Liability of Stockholders and Directors, is apparent in the addition of several entirely new sections running through the book. Even more important additions, in view of recent problems, appear in new sections on Voting Trusts and Pooling Agreements, Contracts to Prevent Competition, Trusts and Pools, and Power to Consolidate. Other notable sections are those on the Position of a Foreign Corporation ceasing to do business within the state, Suits by Stockholders on behalf of Corporation, and Power of Corporation to hold its own and other stocks. In all of these sections the recent law has been embodied with clearness and accuracy.

Important as the text revisions are, the bulk of the new matter is found in the notes, where the additions affect the entire work. More than 1,700 new cases have been added, many of them cited several times; and the volume of "text notes" explaining minor modifications has been almost

doubled. This part of the work seems to have been done with care and discrimination, the new cases, so far as they are merely cumulative, being for the most part from jurisdictions not previously cited. The notes are especially rich in New York and United States decisions. In numerous instances the editor has improved the accuracy of the citations by splitting up the old notes into several parts to correspond with the several divisions of the sentence to which they were originally appended. Another notable feature is the addition to all citations, old and new, of references to the American Reports and Lawyers' Reports Annotated, as well as to the National Reporter System. To the ordinary practitioner this change will add greatly to the convenience and availability of the book.

The new edition is not entirely free from criticism. The text is still inadequate upon such subjects as Joint Stock Associations and Acquisition of Membership in Corporations. In the notes, it is a disappointment, though perhaps an inevitable one in a work of one volume, that so many cases are cited as "contra" or to be "compared," without further comment. Also one misses such important cases as *Blum* v. *Whitney* (1906) 185 N. Y. 232, under Liability of Promoters, *American Smelting & Refining Co.* v. *Colorado* (1907) 204 U. S. 103, under Status of Foreign Corporations, and *Union Transit Co.* v. *Kentucky* (1905) 199 U. S. 194, and *New York Central* v. *Miller* (1906) 202 U. S. 584, under Situs of Personal Property for Taxation, all of which must have been decided before the completion of the work as indicated by the preface. On the whole, however, the work has been carefully prepared. With the excellent foundation upon which it is based, it may well stand as one of the foremost in the series in which it is published, and, within the limits to which it pretends, one of the foremost upon the subject.

PARTITION OF REAL PROPERTY BY ACTION. By SAMUEL C. MOUNT. New York: Fallon Law Book Co. 1907. pp. vi, 307.

Five pages of this volume give a very brief outline of the history of an action of partition in the State of New York, attention being called to the relation of the present Code practice to the practice in the Court of Chancery, prior to the Codes, and to the propriety of resorting to the former practice for precedents in cases not covered by the present statutory provisions; a single page contains a few suggestions in relation to parties; and the remainder of the book (excluding the index) is devoted to forms with notes of decisions and statutes relating thereto. The facts assumed to exist by the complaint present a somewhat complicated situation, so far as the question of parties is concerned; the forms cover all the proceedings from the beginning of the action to its termination in final judgment, sale, and distribution of proceeds; and appear to have been carefully prepared and to be accurate. This summary of contents indicates that Mr. Mount was not looking for fame in the preparation of this volume, but was moved by the laudable desire to render a useful service to his fellow workers in the profession in the State of New York, by giving them assistance in the important and difficult task of so conducting an action of partition that jurisdiction of all necessary parties shall be acquired, and that the purchaser at the sale shall secure a good title.

Very likely, forms equally good may be found in different portions of

such a work as Abbott's Forms, but this volume has the great advantage of taking the practitioner step by step from the beginning to the end of the action, and of being, therefore, more likely to prevent a mistake from being made through oversight, or from misinterpretation of some of the numerous, but related, statutory provisions.

AMERICAN CONSULAR JURISDICTION IN THE ORIENT. By FRANK E. HINCKLEY. Washington: W. H. Lowdermilk & Co. 1906. pp. xx, 283.

The author of this book pursued his research work with a care and thoroughness to which the work itself amply bears witness, while a student in the Political Science School of Columbia University. The work covers a field which has never been specially treated by any English or American author heretofore and only partly by one or two Continental writers, and if for no other reason is therefore of considerable worth. The expansion of our commerce and the growth of our National interests in the Orient renders such a treatise especially valuable at the present time.

The work is properly divided into seven chapters. The first describes the history and development of the theory of extraterritoriality. In the second the various treaties of the United States involving this principle are enumerated and commented upon. The third deals with the Congressional acts establishing our various Consular courts. The fourth enumerates and describes the numerous rights arising out of the theory of extraterritoriality. The fifth describes the special tribunals of Egypt and China, the sixth, the foreign settlement of Shanghai, and the seventh, the grounds for the relinquishment of this extraordinary jurisdiction.

In the first chapter the author interestingly describes the causes for the existence of this extraterritorial jurisdiction. The desire of the traders of the Italian cities of the Middle Ages to protect their commerce in the Levant is properly given as the main reason for the establishment of this practice. For this purpose they secured charters or capitulations, a name by which the treaties with Turkey were called even down through the 19th century. In 1199 the Greek Emperor Alexius III issued the first capitulation which described in detail the rights and privileges of extraterritoriality granted to the Venetians. The system expanded during the various Crusades owing to the numerous Christians visiting the near East and the increased trade and commercial activities which naturally followed them. After the fall of Constantinople, we find Francis I of France establishing the right of Frenchmen, who were then the leading traders in the Mediterranean, to be governed by the laws of France while residing in Turkey. In 1533, England, and later Holland, Austria and Russia, followed respectively in securing similar privileges for their subjects in the Sultan's domain.

The principle was not applied to China until 1842. The author in this chapter fails to describe the establishment of this principle in Japan, which might very properly have been here done. The underlying difference between the treaties of the near East and the Far East lies in the fact that the treaties of the Levant recognized the previous existence of custom, or what might be termed an unwritten or common law on the subject, while in the Oriental treaties the right is first recognized in the treaties themselves.

The second chapter is devoted to enumerating, describing and giving a

brief history of our own treaties of exemption from native jurisdiction. The history of the celebrated Turkish treaty with the disputed interpretation of the fourth article which was not finally settled until years after its execution is given in detail. The author calls attention to certain correspondence of two early American Consuls in Turkey, Francis Dainese and John P. Brown, which seemingly had been entirely overlooked during this entire controversy, and which no doubt if known at the time would have probably been of considerable aid in bringing about on the part of our officials a clearer understanding of the early practice in Turkey, both of our own and other governments. The various Chinese and Japanese treaties and the great work of Caleb Cushing and Townsend Harris, Western pioneers in the Far East, are of course described, and proper importance given to their great work. The author, however, fails to mention or to throw any light upon the civil side of the law of extraterritoriality in this chapter, but confines his pen to its history and its development in matters of criminal nature. In the following chapter, however, in dealing with the acts of Congress establishing consular courts, he describes adequately both the criminal and the civil jurisdiction of our consular courts, and the recently established United States Court in China. This chapter should be of considerable interest, not alone to the practicing attorney in these parts, but to students of political science, the general reader and the merchant. This jurisprudence and practice is of growing importance, especially in China, so much so that our Government only in 1906 established a special United States Court in China and reorganized our practice in that empire. The various questions of practice, process, pleading, constitution of the Court, execution of judgment and appeals are dealt with, and citations (which are of course at present few) upon the points are given. A short account of the British and French legislation on the subject is then set forth from which it is evident that these countries have given the various questions arising out of the existence of Western activities in the heart of the Orient, much more thought than we have heretofore given them.

In the following chapter the various legal rights existing under this jurisdiction are described with the authorities bearing upon them. These are the result only of the most careful and painstaking research. The questions of nationality, marriage, divorce, domicile, inheritance, crimes, real property, taxation and commercial privileges are discussed. The different degree to which extraterritorial jurisdiction has been extended is demonstrated in the cases of China and Turkey in the matters of real estate. In the former the *lex loci* is applied and is administered by the respective National Consuls, while in the latter country all matters pertaining to real estate are solely within the Province of the Turkish Courts.

In the chapter on the International Tribunals of Egypt the history of the establishment of these tribunals is given. They are composed of native judges and judges from several European countries and the United States. The nature and extent of their jurisdiction and the Egyptian Code based as it is upon the French Code, which is the law administered by these tribunals, are described by the author. The necessity of such Court is proved by the fact that over 47,000 cases have been argued before them. The final chapter is devoted to the grounds of relinquishing jurisdiction. Here the

very interesting questions arising from the establishment of a Protectorate over a country in which this jurisdiction has been in force, the advancement of a State in civilization, military occupation, the acknowledgment of independence of a portion of an heretofore oriental State, are thoroughly discussed and numerous historical instances set forth.

A valuable and thorough appendix containing important decisions, acts of Congress, treaties and reports and a carefully arranged index, is added to the work. The author has displayed the greatest care in the collection of his foot notes, and his marginal phrases are of considerable aid to the reader.

The work has filled a long felt want in the field of Consular jurisdiction, and will no doubt be of constant help to our officials in those countries where the theory of extraterritoriality still remains in operation.

The author has been deservedly rewarded for his efforts by being appointed the clerk of the United States Court in China.

ACT OF STATE IN ENGLISH LAW. By W. HARRISON MOORE. New York: E. P. Dutton & Co. 1906. pp. xi, 178.

This short but comprehensive work is composed of seventeen chapters treating by the case-study method the most important phases of public law from the standpoint of the sovereign power. The earlier portion deals with the status of Acts of State under the absolute monarchy; the greater part treats of the same problem under the constitutional monarchy and the republic. So far have the theories changed that the former part has chiefly a historic value; the latter is of course of more immediate interest.

Of particular interest in the seventeenth century discussion is that portion bearing upon the spheres of power as to-day recognized, the legislative, executive and judicial. It was laid down in *Darnel's Case,* 3 State Trials 36-37, that the King's acts, writs, commissions, etc., were not exempt from examination by the courts; and the executive was not to interfere with the prerogative of the courts. The King's absolute power was long held to be above the common law and constituted the *lex terrae.* "Matter of State" was early defined by Bacon as "whatsoever concerneth any great portion of the people"; what the King and council deemed *pro saluti populi.* James I held that the Matter of State as it concerned the mystery of absolute power could not be examined into; this belongs "to them that sit in the throne of God" (p. 18). The case of *Godden* v. *Haler* (1686) Shower 475, holds that in respect of the laws of government if not of property the King is absolute, and part of the constitution is above the power of Parliament. Of course in the Revolution of 1689 Parliament became supreme. If the absolute prerogative is considered as a part of the "law of the land," then certainly it cannot be said to be above this law. What modification the "necessities of war" made in the situation is discussed.

Under the caption "Facts of State" the author has interesting things to say on the status of ceded territory, the power of the King in relation to the national domain, and kindred topics. In England the Crown can annex and cede territory by proclamation and with no limitations by any department, and by implication bind the courts by any situation it may thus, by an Act of State, create. The Court, on the other hand, legally established in

Janson v. *Dreifontein Gold Mines Co.* [1900] 2 Q. B. 339, when the fact of war existed as between England and the Transvaal on evidence presented by Bluebooks and Reports.

Chapter V has material of peculiar interest to American students, as it bears closely upon the power of the states as non-suable bodies. The Crown may allow suit through its agents; the Eleventh Amendment of the Constitution of the United States protects states from suit except upon their permission. In Chaper VII will be found valuable material on Colonial government. The first case in English law was *Witham* v. *Dutton* (1688) 3 Mod. 160. The necessity was long recognized of keeping the sovereignty in the Home Government. Mansfield held that an action either civil or criminal could not lie against a governor. Great cases have of course arisen over the power and liability of governors, viceroys, lord lieutenants, etc., for an instance of which see the case of Warren Hastings. Refined distinctions are drawn between acts of power which are justiciable and Acts of State which are not. In the case of *Musgrove* v. *Pulido* (1879) 5 App. Cas. 102, it was held that the governor of Jamaica could be called to answer before the Court; but when the Court held an act to be an Act of State he was not liable.

In contrast to the lodgment of the treaty-making power in the President and Senate in this country, the Crown possesses this power exclusively in England. Of more interest is the discussion of the binding nature of treaties. In England violations of treaties by subjects have been held to be criminal, and commercial agreements violating commercial treaties have been held invalid. An interesting discussion handles the rights of citizens of ceded lands under treaty-grants.

The whole question of the sanction of international law is raised in the chapter on the relations of external states. The general statement is made in the case of *Secretary of State for India* v. *Kamachee Boye Sahaba* (1859) 13 Moo. P. C. 22, that "all transactions between independent states are governed by other laws than municipal Courts administer." The author does not seem to be as clear on the powers of the Supreme Court in relation to disputes between states of the American Union. While there are cases where the courts might refuse to treat certain matters for political reasons, yet the direct grant of power by the Constitution is to the Supreme Court. *Missouri* v. *Iowa* (1849) 7 How. U. S. Rep. 660, is one of the interesting decisions on the exercise of this power by the Supreme Court. In this case the two states involved agreed to carry the case to the Supreme Court, the only body qualified in the United States to decide such a conflict.

In connection with the discussion of the nature of acts of belligerent states in time of rebellion it should be remembered that while the persons taken by Northern troops in our Great Rebellion were treated as prisoners of war, yet the executive held that all who had taken part with the Confederacy had been treasonable; Lincoln holding to the doctrine of individual and not state responsibility.[1]

The work here briefly reviewed has much in it for the student of international and municipal law. Abundant cases are cited and the fields, touched on in an illuminating manner, offer inducement for further research. This is probably the greatest service of such books to the specialist and the serious

[1] Dunning: Essays on the Civil War and Reconstruction. 1898. p. 102.

student. Opening up many questions of practical and historical interest from an English viewpoint the work should meet with a cordial reception on this side of the water.

REVIEWS TO FOLLOW:

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AN ESSAY ON PROFESSIONAL ETHICS. By Hon. GEORGE SHARSWOOD, LL.D. (Reports of the American Bar Association, Vol. XXXII.) Fifth Edition. Philadelphia: T. & J. W. Johnson Co. 1907. pp. 196.

"SHORT SALES" OF SECURITIES THROUGH A STOCKBROKER. By ELIOT NORTON. New York: The John McBride Co. 1907. pp. 71.

LEGAL ESSAYS. By JAMES BRADLEY THAYER, LL.D. Boston: The Boston Book Co. 1908. pp. xvi, 402.

WILLS AND THE ADMINISTRATION OF THE ESTATES OF DECEASED PERSONS. By WILLIAM PATTERSON BORLAND. Kansas City, Mo.: Vernon Law Book Co. 1907. pp. xvi, 311.

THE AMERICAN CONSTITUTION. By FREDERICK JESUP STIMSON. New York: Charles Scribner's Sons. 1908. pp. 259.

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VESTED AND CONTINGENT REMAINDERS.

The very able and interesting criticism appearing in a recent number of the *Harvard Law Review*[1] of a distinction between vested and contingent remainders advanced by me[2] invites a further word upon the subject.

Only future interests of freehold which are bound, either by act of the parties or by operation of law, to take effect, if at all, by way of succession after a particular estate of freehold, are properly called *remainders*. In considering the distinction between what *remainders* are contingent and what are vested, we have, therefore, properly no concern with interests of freehold limited after *terms for years*. Such interests are not remainders. They are not future interests. If valid at all, they are present interests and the seisin of the freeholder is a present seisin[3]. The freeholder's wife or husband has dower[4] or courtesy. The freeholder, even though not the original purchaser, constitutes a new stock of descent[5]. On the other hand, a remainderman had no seisin at all. After mentioning that the reversioner had a sort of seisin because of the services rendered him, the learned authors of Pollock and Maitland's History say[6]: "On the other hand, we cannot find that any sort or kind of seisin was as yet attributed to the remainderman. He was not seized of the land in demesne, and he was not, like the reversioner, seized of it in service, for no service was due him." The absence of seisin in the remainderman seems always

[1] XX Harv. L. Rev. 243-245.

[2] Future Interests in Land, 22 L. Q. R., 383.

[3] Challis, Real Property (2nd ed.) pp. 70, 89-90.

[4] Scribner on Dower (2nd ed.) 233.

[5] Bushby *v.* Dixon (1824), 3 B. & C. 298 (4 Gray's Cases on Property, 10).

[6] 2 Pollock & Maitland, History of English Law, 39.

to have continued, for Hargrave says (the italics are his)[7]: "But, in opposition to what may be termed the *expectant* nature of the seisin of those in remainder or reversion the tenant in possession is said to have the *actual* seisin of the lands." It followed, from the fact that the remainderman had no seisin that he did not render feudal services.[8] He could not bring a writ of right.[9] In order to transfer a remainder the co-operation by attornment of the tenant was necessary, so that the actual seisin of the freehold in possession might be held for the grantee of the remainderman.[10] A remainderman, other than one who was an original purchaser, did not constitute a new stock of descent.[11] The consequences arising from the fact that the remainderman had no seisin have come down to us in the rule that there can be no dower or courtesy in a remainder.[12]

Whether, then, an interest after a term is a vested interest—*i. e.* a present freehold interest, valid at common law—or a contingent interest—*i. e.* one wholly invalid at common law—is quite a different question on principle from whether a freehold after a particular estate of freehold is a vested or contingent remainder. It is quite improper to attribute to one discussing the distinction between vested and contingent remainders only, the proposition that where the limitations are to A for twenty years, remainder if B, a bachelor, die before the end of A's term, to the children of B, the children of B have a "vested remainder." Obviously, also, no distinction between vested and contingent remainders can be founded upon the fact that the vested remainderman had seisin, while the contingent remainderman had not, for the fact appears to be that neither had it till their interest came into possession. Before then, as Hargrave says, the seisin was merely of an "expectant nature."[13] It would seem to follow also that no

[7]Co. Lit., Hargrave's note, 217.

[8]2 Pollock & Maitland, History of English Law, 39.

[9]Lit. sec. 481.

[10]Mystery of Seisin, by F. W. Maitland, 2 L. Q. R. 481, 490-493.

[11]4 Kent Com. 387. In this respect also the remainder was on the footing of a mere right of entry by one disseised. (The Mystery of Seisin, by F. W. Maitland, 2 L. Q. R. 481, 485.)

[12]Co. Lit. 29a, 32a; Scribner on Dower, 2nd ed. 233, 321. In this respect the remainder was on the footing of a mere right of entry by one disseised. (Mystery of Seisin, 2 L. Q. R. 481; 485, *et seq.*)

[13]Observe, however, that one could not stand seized of a contingent remainder to uses, but could stand seized to uses of a vested remainder. [Saunders, Uses (5th ed.) 106, 1 Gray's Cases on Prop. (2nd ed.) 397.] This might at first seem to indicate that a contingent remainderman had no

distinction between vested and contingent remainders could be drawn on the line that the feudal law recognized one as inherently "something" and the other as inherently "nothing." No doubt in the more remote feudal period of land law an interest in land was not regarded as a "thing" unless it had the thoroughly corporeal attribute of actual seisin. If it lacked that quality it was a mere "right." As a corporeal thing to be dealt with it was nothing. Since, then, there was no actual seisin even in a vested remainder, no remainderman had a corporeal thing with which he could deal as such. Vested and contingent remaindermen alike, from the purely feudal point of view, had mere abstractions. This process of exclusion would seem to leave as the sole basis for a distinction between two mutually exclusive classes of remainders, their validity or invalidity during the period when feudal principles of land law prevailed. From the point of view of the validity of the remainder at such a time, it may well have been thought of as "something," as distinguished from another class of remainders which were invalid or had only a possibility or prospective validity and which might be thought of as "nothing" until the certainty of their validity became fixed. In short, "vested" in the feudal law was the equivalent of what was recognized by that law as a valid creation of rights from the moment of creation. "Contingent" characterized those remainders which were wholly invalid, and after 1430 became valid provided they became bound to, and did actually, take effect in possession by way of succession.

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seisin, but that a vested remainderman had, and thus to contradict the older law. In truth, however, it only indicates that the Statute of Uses would execute any use declared of an *alienable freehold.* To that extent the actual language of the statute which seemed to require actual seisin to uses was departed from. This view is supported by the actual language of Saunders (*supra*), who founds the difference between standing seized to uses of a vested remainder and a contingent remainder upon the fact that the former is alienable and the latter not. That this is the real line of distinction can be demonstrated in another way. If a rent charge is granted to A and his heirs, A was in by the common law, and had no possession or seisin of the rent till the first payment was made. [Orme's Case (1872) L. R. 8 C. P. 281; 1 Gray's Cases on Prop. (1st ed.) 524.] Nevertheless, if the same rent charge were granted to A and his heirs to the use of B and his heirs, B was in actual possession or seisin of the rent at once by the Statute of Uses. [Heelis *v.* Blain (1864) 18 C. B. N. S. 90, 1 Gray's Cases on Prop. (1st ed.) 506, (2nd ed.) 404.] If before the Statute of Uses would execute the use to B, A must have had an actual seisin, B could have had no actual possession or seisin by way of use till A was seized or possessed, according to the common law. It is, therefore, plain that the statute executes all uses of freeholds which are alienable whether there is any actual standing seized to uses or not.

It is agreed that a future interest of freehold after a particular estate of freehold, which is sure[14] to take effect in possession sometime, and when it does so, must so take effect by way of succession, is properly called a vested remainder. It is equally clear that a future interest of freehold after a particular estate of freehold limited upon an event, which, according to the expressed intention of the settlor, may occur before or at the time of, or after the termination (whenever and in whatever manner) of the preceding interest, is a contingent remainder. It will doubtless be conceded that the terms "vested" and "contingent" as here used merely sum up certain common law or feudal results of cases where the character of the remainder makes a difference. To say that the interest is "vested" is to declare that it was originally and still is valid or indestructible, and alienable *inter vivos.* To say that the remainder is "contingent" is to affirm that, originally entirely invalid, the future interest has had, since 1430, a limited sort of validity—*i. e.* that it is destructible and inalienable *inter vivos.*

It is apparent that between the class of remainders which we agree are contingent, and those which we agree are vested, there lies a further class: *viz.*, those which, while not sure ever to take effect in possession, are bound by the express terms upon which they are limited, to do so, if at all, by way of succession. Of this sort is the case where the limitations are to A for life, remainder to B and his heirs, but if B dies before the termination of A's life estate (whenever and however that may occur), then to C and his heirs. Here the coming into possession of B's interest is in fact contingent upon his surviving the termination of A's life estate, but because the condition is expressed as subsequent in form B's interest is sure to take effect in possession, if at all, by way of succession according to the express declaration of the settlor. The same is true if the limitations are to A for life and then, provided B survive the termination (whenever and in whatever manner that may occur) of A's life estate, to B and his heirs, and if B does not so survive the termination of A's life estate, then to C and his heirs. Here B's interest is subject to a condition precedent in fact and in form, but it is bound by the express declaration of the settlor to take effect in possession whenever and however the preceding estate determines. Similarly, if the limitations be to A for

[14] "Sure" perhaps to some degree in a relative sense, for, as Mr. Bingham points out, because of escheat, it may never take effect in possession. (5 Mich. Law Rev. 497.)

life and then to the eldest son of B, a bachelor, in fee, provided said son be born at or before the termination (whenever and in whatever manner) of A's life estate, the unborn son has a future interest which is bound, according to the expressed declaration of the settlor, to take effect in possession whenever and however the preceding estate determines.

Whether the remainder immediately following the life estate in each of these cases is to be called vested or contingent will depend upon whether the result or results which are properly summed up in the word "vested" occur with respect to them, or whether the results which are summed up in the characterization "contingent remainder" exist. If some of the results which attach to vested remainders and some of those which are applicable to contingent remainders appear with reference to any example of this third sort, then, I suppose, unless we can determine which results more properly go with the terms "vested" and which with "contingent," we must give it a new name. It might, for instance, be called a contingent vested remainder, or a vested contingent remainder, according to the bias of its sponsor. In short, in order to determine whether a remainder is to be called "vested" or "contingent" we need, not some vague metaphysical straining after the determination of what future interests are "something" and what are "nothing," and involving an assumption of the very point in issue, but a thoroughly pragmatic test.

(1) Where the limitations are to A for life, remainder to B and his heirs, but if B die before the termination of A's life estate, whenever and however that may occur, then to C and his heirs, B's remainder is, it is agreed, properly called vested.

Clearly it is not destructible by any rule of law defeating intent. The fact that the condition precedent to B's interest ever taking effect in possession is expressed as subsequent in form causes the future interest, by the express declaration of the settlor, to take effect, if at all, by way of succession.

Nor is there any objectionable abeyance of the fee prior to the taking effect of B's or C's interest in possession. True, until the termination of A's life estate you cannot tell whether B or C will be entitled to take possession in fee. In the meantime, then,—*i. e.* while A's life estate continues—it might be said that the fee is in abeyance or that there is a reversion in fee in the settlor, which must be cut short by the taking effect in possession of B's or C's interest. But such an abeyance of the fee could hardly have been

objectionable. The abeyance of the fee which must be avoided at all hazards was that which occurred where there was a gap in the *actual* seisin—*i. e.* when no one was in possession. Such an abeyance of the seisin was not remedied by the fact that a reversioner in fee stepped into possession temporarily during the gap with an actual seisin, which would, however, be cut short or interrupted by the taking effect in possession of a further interest expressly limited. Feudal land law did not, it is submitted, concern itself with where the title or ownership was, pending the actual seisin of the freeholder in possession. So long as the remainder could not, by taking effect in possession as expressly limited, by any possibility do otherwise than cut short a reversion in fee which had never come into possession and in which, consequently, there was no actual seisin, it was unobjectionable. So far as that remainder was concerned the reversion was entirely *in nubibus*. If a reversion in the settlor did take effect in possession because of the failure of such a remainder to do so, it was properly regarded not as filling a gap before, but as coming after the remainder which had dropped out. In short, no reversion was conceived of as existing with reference to a particular gap in the fee unless there were at least the possibility that it would fill such a gap by actually coming into possession. It was not, therefore, conceived of as existing between two interests which were bound by the express declaration of the settlor to take effect by way of succession. This, it is submitted, is the precise explanation of the fact that B's remainder in the case put is not objectionable because of any abeyance of the fee, or because when it took effect it cut short a reversion in fee in existence only during the continuance in possession of the life estate and prior to the time that the remainder to B took effect in possession.

Whether B's remainder was alienable or not is a question which, if ultimately the same as whether it is destructible by a rule of law defeating intent, must at least be approached differently. The feudal law declared what we agree is a contingent remainder to be inalienable, because it could not be conceived of as any interest at all, but only as a right possibly to get an interest.[15] From this followed a further reason for inalienability, *i. e.*, the fear of maintenance.[16] These considerations applied with particu-

[15]Mystery of Seisin, by F. W. Maitland, 2 L. Q. R. 481, 483, 484, 489, *et seq.* (dealing with the alienability of the right of entry of one disseised).

[16]Mr. Maitland seems to doubt the sufficiency of the fear of maintenance as a sole independent reason for holding rights of entry inalienable. (Mystery of Seisin, 2 L. Q. R. 481, 484, 489.)

lar force where the remainder was such as we agree is contingent, for it was originally regarded as void entirely, because of the possibility of a gap, and even when it was allowed to take effect provided it did so by way of succession, it was still regarded as void till the fact that it was sure to do so was determined. Now, whether these same considerations would, in the time of Littleton, have caused the remainder which was so expressly limited that it must have taken effect by way of succession, if at all, to be alienable, we cannot tell. When the question of the alienability of such an interest first came up it did so in the light of more modern influences. The jealousy of maintenance as applied to the alienability of contingent remainders had passed away. The idea that the transfer of anything was only a transfer of rights and never of a corporeal thing, was at least an easier and more common notion.[17] It was not difficult to think of B's remainder as alienable. It was held to be so, and in this connection it was called "vested."[18]

(2) Suppose, now, we take the case where the limitations are to A for life, remainder, if B survive the termination (whenever and in whatever manner) of A's life estate, to B and his heirs, and if B does not so survive the termination of A's life estate, then to C and his heirs. Here B is a person *in esse* who may by possibility take. He may not take, but if anyone does take under the limitations in question, he will be the one. There is, however, a condition precedent in substance and in form to his taking that he survive the termination of A's life estate. Here, also, it is clear that B's remainder has at least one attribute of a vested remainder. It is not destructible by any rule of law defeating intent. There is no more an objectionable abeyance of the fee than in the case where the same condition is expressed as subsequent in form. In both the one who is to take at the termination of the freehold in possession is uncertain. But it must be B or C. There can be no more difficulty with an abeyance of the fee in one case than in the other. If in place of C there be a reversion in the settlor the situation is not altered so far as any objectionable abeyance of the fee is concerned. Is B's remainder alienable? Here again it is impossible to say what answer the lawyers of the time of Littleton

[17]Mystery of Seisin, by F. W. Maitland, 2 L. Q. R. 481, 489, 490; Digby, Hist. of Real Prop., App. to Part I (11) note.

[18]Blanchard *v.* Blanchard (1861) 1 Allen (Mass.) 223.

would have made, for the cases of this sort seem not to have arisen till the 17th and 18th centuries. Then the judges seem to have had no difficulty about assuming it to be alienable. Certainly, so far as alienability is concerned it would be difficult to find a rational ground of distinction between two cases where the remainders were exactly the same in all respects and subject to precisely the same condition precedent in fact to its ever taking effect in possession, and to precisely the same sort of abeyance of the fee, if any, but where in one the condition is expressed as precedent in form and in the other as subsequent in form.

The comparatively modern cases, which are, so far as the writer knows, also the only ones we have, bear out the assertion that B's remainder in the case put is not destructible by any rule of law defeating intent, and is alienable. They equally bear out the assertion that the remainder is by every proper usage called "vested." Modern writers of acknowledged eminence have justified these results upon principle—the principle being, it is submitted, that the remainder is bound by the express declaration of the settlor to take effect, if at all, by way of succession.

Suppose, for instance, the limitations are to A for life and if B overlive A, then to B for life. Here, if you take the contingency literally, B has a contingent remainder, because the event of B's overliving A might not occur till after A's estate had come to an end prematurely by forfeiture or merger.[19] The approved construction, however, has always been that the phrase "if B overlive A" means "if B survive the termination, whenever and however, of B's life estate." Under this construction of the language used, B's interest is bound to take effect, if at all, by way of succession. It should therefore be held vested, though it is subject to a condition precedent in fact, and the condition is expressed as precedent in form. It is settled that B's interest is vested.[20] It is not held indestructible by a rule of law defeating intent and then called a contingent remainder. It is called "vested." It should be observed that in supporting this holding on principle no effort whatever is made to torture

[19]The New Hampshire Court, so long as it took the contingency literally as stated, was perfectly sound in holding the remainder to B contingent: Hall *v.* Nute (1859) 38 N. H. 422; Hayes *v.* Tabor (1860) 41 N. H. 521.

[20]Webb *v.* Hearing (1617) Cro. Jac. 415 (5 Gray's Cases on Property, 47).

the condition into one which is expressed as subsequent in form. There is no difficulty that there is an abeyance of the fee or that the settlor has a reversion in fee which is cut short by the taking effect in possession of B's remainder. There is no chance that there will be a gap in the seisin or that this reversion can ever come into possession, so that the taking effect of B's interest will cut short the actual seisin of the reversioner in possession.

Again, suppose the limitations be to A for life with power to appoint, and in default of appointment to B and his heirs. Here, B's remainder is clearly subject to the condition precedent to its taking effect in possession, that A must have failed to appoint. It is as uncompromisingly precedent in form as it well could be. So long as the court took the construction of the condition literally that B could not take an interest in possession until A's death without appointing, the remainder was contingent, because such an event might not happen until after the termination of A's life estate. But by construing the remainder to B as required to take effect whenever and however the preceding estate determined, if A had not at that time appointed, the future interest became clearly indestructible by any other event than that expressly specified by the settlor, namely, the appointment by A. This was the precise holding of *Doe d. Willis* v. *Martin*,[21] for there it was decided that the remainder to B was not destroyed by the premature determination of the life estate. Did the court then say that because the remainder was subject to a condition precedent in fact and in form, it could not be conceived of as "anything," and hence, though not destructible by any rule of law defeating intent, it must be called a "contingent remainder"? Not at all! The moment it was not destructible by any rule of law defeating intent, it became *ipso facto,* in the language of the court, a "vested remainder." No doubt, it was said by Lord Hardwicke, in holding the remainder in default of appointment vested[22] that "the only effect thereof [*i. e.*, of the power of appointment] is that the fee which was vested was thereby subject to be divested if the whole was appointed." This language, however, obviously only describes the result which follows from the conclusion that the remainder is vested. It does not describe the reason for that conclusion.

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[21](1790) 4 T. R. 39 (5 Gray's Cases on Property, 62).

[22]Cunningham *v.* Moody (1748) 1 Ves. Sr. 174, 177.

It does not in the least declare that the language is to be tortured into a condition subsequent in form. The ground for the court's action is more clearly hinted at when Lord Hardwicke says: "And there is no occasion to put the inheritance in abeyance; which the court never does but from necessity * * *." Clearly Lord Hardwicke was not worried by any abeyance of the fee which occurred only during the continuance of the particular estate of freehold. Nor did he shrink from a holding which caused the reversion in fee to shift during the continuance of the particular estate to the remainderman appointed or to the remainderman in default of appointment, according as the circumstances stood at the termination of the life estate. The only abeyance of the fee which he saw must be avoided was that which left a gap in the actual seisin, or which, because the gap was filled with the actual seisin of a reversioner who took possession, caused that seisin to be cut short by the taking effect of a further interest.

The remainder to trustees to preserve contingent remainders was limited in this form: After the gift of a life estate to A it proceeds: "After the determination of the precedent estate, by forfeiture or otherwise, in the lifetime of the tenant, to the use of the trustees and their heirs during the life of such tenant, in trust for him and to preserve the contingent remainders."[23] Nothing could be clearer than that the remainder here is subject to a condition precedent in fact and in form, that the precedent estate must terminate prematurely before the death of the life tenant. Nothing, however, is clearer than that it is a perfect example of a remainder, which by the express declaration of the settlor must take effect, if at all, upon the termination, whenever and in whatever manner, of the preceding estate. Such is the precise and avowed purpose of its existence. It is at once clear, therefore, that the remainder cannot possibly be destroyed by any rule of law defeating intent. It can only be defeated from coming into possession by the happening of the event which the settlor specifies, *i. e.*, by the life estate continuing till the life tenant's death. It has long been settled that the remainder to trustees under such a clause is properly called a vested remainder. Furthermore, it is settled that it has all the attributes of a vested remainder. It is not destructible by any rule of law de-

[23]Challis, Real Property (2nd ed.) p. 131.

feating intent,[24] because no matter how prematurely the freehold in possession might terminate, the estate to the trustees always stood ready to take effect in possession. It is believed also to have been alienable.[25] But more than this, it has been assumed by such writers as Fearne and Butler, and positively affirmed by Mr. Challis, that to call it a vested remainder is correct upon principle.[26] In maintaining this position there has been no insuperable difficulty about the lack of any fictitious and non-existent seisin in the remainderman or with the fee being in abeyance before the estate to the trustees comes into possession. The remainder to the trustees is not regarded as objectionable because it cuts short a reversion in the settlor which fills a gap in the fee between the time when the life estate is created and when the remainder to the trustees takes effect. The proper view is that there is no gap in the fee at least until after the remainder to the trustees terminates. Mr. Challis in reviewing the whole subject does not even mention any lack of seisin or abeyance of the fee. No attempt has been made, so far as I know, to torture the express language into such shape that it appears to make the condition precedent in fact subsequent in form. The reason for the holding of the remainder to the trustees vested, as summed up by Mr. Challis,[27] is, it is submitted, exactly that here contended for, *namely,* that the remainder is bound by the express declaration of the settlor to take effect, if at all, by way of succession. Mr. Challis says: "The estate of the trustees is such that it either must actually take effect in possession or else must determine by natural expiration *eo instanti* with the determination of the precedent estate." Then he adds, "no words could be more appropriate to describe a vested estate."

That Mr. Challis's view of the distinction between vested and contingent remainders is that maintained by the writer is clearly brought out in his support of the view that the remainder to trustees to preserve contingent remainders is vested. The

[24]This, of course, follows from Smith d. Dormer *v.* Packhurst (1741) 3 Atk. 135 (5 Gray's Cases on Property, 55), Fearne C. R. 220, although there the interest in the trustees to preserve the contingent remainders was after a term for years.

[25]If it was not alienable then that proves beyond all doubt that the sole test for determining what remainder is vested is whether it is not destructible by a rule of law defeating intent.

[26]Challis. Real Property (2nd ed.) p. 135.

[27]Real Property (2nd ed.) pp. 133-135.

argument that the remainder is contingent was that it fell precisely within Fearne's first class of contingent remainders, since it "depends entirely upon a contingent determination of the preceding estate itself." This Mr. Challis admits, but concludes that Fearne's language describing the first class of contingent remainders is slightly defective. To make it perfect Mr. Challis proposes this amendment: "Provided always, that the precedent estate be capable of determination in at least one way, which will neither vest the remainder [*i. e.*, require it to come into possession] nor cause it to determine by its own natural expiration." Now, the only effect of this amendment is to demand the possibility of a gap between the precedent estate and the taking effect in possession of the remainder. Here then, at least, is one writer who marks the distinction between vested and contingent remainders precisely on the lines submitted. If a remainder to a person *in esse* who must take if anybody does, though in fact contingent, and though the contingency is expressed as precedent in form, is bound by the express declaration of the settlor to take effect in possession, if at all, whenever and however the preceding estate determines, it is vested. The necessary fact to make it a contingent remainder is that there be by the express language of the limitations the possibility of a gap—*i. e.*, that the event upon which it is to take effect in possession be by the express language of the settlor one that may happen either before or at the time of, or *after* the termination, whenever and however that may occur, of the preceding estate.

This view is precisely in accord with the declaration of Butler,[28] and afterwards repeated by Mr. Challis,[29] that "*all* contingent remainders appear to be so far reducible under one head, that they depend for their vesting upon the happening of an event, which, by possibility, may not happen during the continuance of the preceding estate, or at the instant of its determination." It is supported by the statement of Mr. Hawkins[30] and approved by Professor Gray[31] that the word "vested" had originally no reference to the absence of contingency. It is precisely in accord with Professor Gray's own statement of the definition of

[28]Fearne, C. R. 9, Butler's Note g.

[29]Real Property (2nd ed.) 114-115.

[30]Hawkins on Wills, p. 221.

[31]Rule against Perpetuities (1st and 2nd eds.) § 100.

a vested remainder,[32] *namely,* "A remainder is vested in A, when, throughout its continuance, A, or A and his heirs, have the right to the immediate possession, whenever and however the preceding estates may determine."

Parliament, at the instance of the Real Property Commissioners, must be regarded as confining "contingent remainders" to precisely the same future interests as Fearne, Butler, Challis and Professor Gray have done. The Contingent Remainders Act of 1845[33] reads: "A contingent remainder" existing after a specified date shall be "capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold, *in the same manner in all respects as if such determination had not happened.*" If the expression "contingent remainder" includes remainders which are subject to a condition precedent which must happen according to the expressed intent of the settlor, before or at the time of the termination of the preceding estate, then this act will defeat the settlor's expressed intent by making such remainders indestructible by the failure of the event upon which they are limited to happen, before the termination of the preceding estate by "forfeiture, surrender or merger." Thus, if the limitations are to A for life and then if B die before the termination of A's life estate, whenever and however it might occur, to B's heirs, and A's life estate determines by forfeiture, surrender or merger, prior to A's death, but A in fact died before B, B's heirs must take by the Contingent Remainders Act of 1845. That, of course, is a *reductio ad absurdum* in the construction of the statute. "Contingent remainder" as used in the Act obviously includes only those remainders which are, by the expressed intent of the settlor, limited to take effect in possession upon an event which may happen either before or at the time of or *after* the termination of the preceding interest. To those interests only has Parliament, at the instance of the Real Property Commissioners, applied the term "contingent remainder."

There is, it should be observed, at least one important practical reason for making a clear line of distinction between remainders which are bound by the express declaration of settler to take effect, if at all, by way of succession, and those which must so take effect, if at all, only by a rule of law defeating intent, and calling

[32]Rule against Perpetuities (1st and 2nd eds.) § 101.

[33]8 and 9 Vict., ch. 106, § 8.

the former vested remainders and the latter contingent. The former are naturally remainders and must always continue to be so. The latter, if carried out according to the expressed intent, would not be remainders at all, but executory interests. It is only a rule of law defeating intent that makes them remainders. The moment then that you have a contingent remainders act which abolishes the rule of law defeating intent, they become what they naturally are, "executory interests." Where such contingent remainders acts exist the difference is wide and fundamental. The Rule against Perpetuities *must* apply to the latter. It may very likely not apply to the former.[34] As a contingent remainder the future interest might not violate the Rule against Perpetuities, while as an executory interest it might do so.

Modern research into the origin and scope of the principles of feudal land law may discover that the statement of the distinction between vested and contingent remainders contended for is quite erroneous. It is pleasant to consider, however, that such an erroneous view seems at present in excellent company.

(3) We come then to the case where the limitations are to A for life, remainder to the eldest son of B, a bachelor, in fee, provided said son be born before or at the termination (whenever and in whatever manner) of A's life estate. Shall the remainder to the eldest unborn son of B be called "vested" or "contingent"? What difference is there between this remainder and the remainder in the cases just dealt with? It is not any more clearly subject to a condition precedent in fact and in form. There is no more lack of seisin in the remainderman here than in any remainderman. There is no other or different sort of abeyance of the fee here than in the case of a remainder in default of appointment or to trustees to preserve contingent remainders. The reversion in the settlor is properly regarded as filling a gap in the fee after the remainder to the unborn son of B, instead of before, just as in the case of a remainder to trustees to preserve contingent remainders, a reversion would be regarded as filling a gap *after* the estate to trustees and not before. In both instances the reversion cannot by any possibility take effect in possession until after the remainder has ceased to have any possibility of taking effect in possession. The remainder to the unborn son of B is bound, like the remainder in default of appointment and to trustees to preserve contingent remainders, to take effect in possession, if at all, by the express declaration of the settlor, in succession. In both alike it is not destructible by any rule of law defeat-

[34] Perpetuities, by Charles Sweet, 15 L. Q. R. 71, 85.

ing intent. For that reason in both cases there was no time when it was, on feudal principles, regarded as wholly void. If that is the test of what remainders are vested, then the remainder to the unborn son of B in the case put must be called "vested."

It may not be possible to produce any case from the year books, or any statement from Littleton, to prove that the feudal law held a remainder to B's unborn son, which was bound by the express declaration of the settlor to take effect, if at all, in succession, valid. The fact, however, that what we agree is a contingent remainder became in a sense valid by the annexation to it by operation of law of the proviso that the future interest must take effect by way of succession or fail entirely, is very persuasive that if the settlor had himself at a perceptibly earlier time added such a provision, the remainder would not have been regarded as wholly void. If, for instance, the remainder to trustees to preserve contingent remainders had been invented and used in the time of Littleton, would it not have effected its purpose? But more than this is the extraordinary fact that remainders, which are clearly subject to a condition precedent in substance and in form to their ever taking effect in possession, have been called "vested" when they were by the express provision of the settlor bound to take effect, if at all, by way of succession, so that they are not destructible by a rule of law defeating intent. We have also the express views of the most eminent writers, which pick out this necessity of the remainder taking effect in possession in succession by the express declaration of the settlor, as the essential and only element which causes it to be called "vested." Finally, an act of Parliament which applies only to "contingent remainders," is excluded from any effect upon remainders which have that attribute, however uncertain they may be to come into possession.

The remainder to the unborn son of B is, it is true, not alienable. If, however, it be true that the remainder in question must properly have been regarded as valid at a time when, what we agree is a contingent remainder, was wholly invalid, then it is now inalienable not because it was, together with what we agree are contingent remainders, wholly void, but simply for the practical reason that there was no one to alienate. If the true test of a vested remainder be whether it was valid at a time when, what we agree were contingent remainders, were wholly invalid, then the fact that it is inalienable solely because of the inherent practical reason that there is no one to alienate, will not prevent the remainder from being called vested.

It will be said, however, that whether the remainder is bound by the express declaration of the settlor to take effect in possession, if at all, by way of succession, is not the sole test of its being vested. It will no doubt be claimed that there is an inherent rational distinction between interests which can be conceived of as existing and those which cannot be. It will be said that when the remainderman is not *in esse* the remainder must necessarily belong to the latter class. The advocate for this position will declare that there is no use going farther than the simple proposition that a remainder which is contingent upon the remainderman's existence does not in the nature of things exist so as to be conceived of as anything, and hence the word "vested" cannot apply to it. No doubt from the very remote feudal point of view when no remainders at all were regarded as anything corporeal, this was true. All remainders then were mere abstractions, mere rights. So soon, however, as the feudal land law called any remainders vested, their division into those which are vested and those which are contingent could not by any possibility proceed upon the ground that one was, from the feudal point of view, inherently something and the other nothing, without first assuming the very point of distinction in issue. Once divorce vested from the feudal idea of something corporeal—that is, an interest in which there is actual seisin—and there is no more difficulty, as a matter of thinking, with regarding a contingent remainder as something than a vested remainder. Both are equally mere abstractions. It is no more difficult to conceive of an abstraction in the shape of an unborn person owning an abstraction in the shape of certain rights than it is to conceive of a person *in esse* owning such an abstraction. In fact, remove the person *in esse* sufficiently far from the personal experience of all of us and he becomes a mere abstraction. It is really no more difficult to conceive of a remainder being vested—*i. e.*, existing—in an unborn person, than of its being vested—*i. e.*, existing—in the King of Siam. If this needs any proof it is to be found in the fact that the legislature finds no obstacle to its providing a proceeding whereby the remainder of the unborn person can be transferred and the proceeds held for him.[35] It is curious then to find a learned editor of the *Harvard Law Review* suddenly assuming in regard to the remainder to the unborn son of B, the mental incapacity of the remote middle ages when no remainder at all was regarded as anything.

[35] Virginia Code, Ann. (1904) Vol. 2, ch. 107, §§ 2432-2436b, p. 1188; Revisal of 1905 of N. C., Vol. 1, ch. 33, §§ 1590, 1591, p. 483.

If to call a remainder to a person not *in esse* a vested remainder seems too violent a disturbance of a certain mental habit founded upon purely metaphysical notions with regard to what interests are vested—notions, I might add, which assume the point in issue before deciding it—one might call the remainder to B's eldest son a "contingent vested remainder," or a "vested contingent remainder," according as his bias or degree of timidity inclines him. Under no circumstances, however, let it be called a "contingent remainder" and confounded with interests which are destructible by a rule of law defeating intent, and which, the moment they cease to be so destructible by modern contingent remainders acts, cease to be remainders at all, and become what they were originally, "executory interests."

(4) Suppose now we return to the two series of limitations first set out. These were as follows: (1) To A for life, remainder to B and his heirs, but if B die before the termination of A's life estate, whenever and however that may occur, then to C and his heirs; and (2) to A for life, remainder if B survive the termination (whenever and in whatever manner) of A's life estate, to B and his heirs, and if B does not so survive the termination of A's life estate, then to C and his heirs. It has been the main thesis of this paper that the future interests in B in both these cases were not contingent remainders and might properly be associated with vested remainders and called "vested" remainders, or at least "vested-contingent" or "contingent-vested" remainders. A reasonable amount of acuteness will suggest that upon the same principle on which this position is taken the future interest in C in both cases can also be similarly named, and that the association of the future interest of C with vested remainders is opposed to the often expressed rule that after a vested remainder in fee there can be no further remainder, to say nothing of a further vested remainder in fee.

Nothing more clearly than this line of criticism indicates how far all rational thinking has departed from the use of some of the formulæ regarding remainders.

The rule that after a vested remainder in fee there could be no further remainder was, it is believed, simply a specific application of the principle which forbade all future interests which were sure to, or which might by any possibility, take effect as shifting interests by way of interruption. The truth is that where one makes the distinction between future interests by way of succession and

shifting interests by way of interruption, he must find in the ultimate analysis the same three sorts of interests that we have observed to exist when the distinction is being made between future interests by way of succession and springing interests by way of interruption.[36] There are first of all the future interests which are sure to take effect, if at all, by way of succession. Secondly, those which are bound to take effect, if at all, as shifting interests by way of interruption. Thirdly, we must find future interests which may take effect by way of succession or as shifting interests by way of interruption, according as events turn out. Thus, where the limitations are to A for life, remainder to B and his heirs, but if B does not survive the death (literally) of A, then to C and his heirs, the future interest of C will take effect by way of succession precisely like a remainder if B dies before the termination of A's life estate. On the other hand, C's interest, if it take effect as limited, will do so as a shifting interest by way of interruption if A's life estate terminates before A's death and then B dies before the death of A. It is conceivable that as in the case of those interests called contingent remainders, which are limited upon an event which makes it possible, according to the expressed intent of the settlor, that they should take effect in possession by way of succession, or as springing interests by way of interruption, C's interest in the case put might have been valid at common law provided, as events afterwards turned out, it actually did take effect by way of succession. Otherwise, like the contingent remainder, which as events turned out, could only take effect as a springing interest, it would be void. Such a rule, however, did not become the law. C's interest remained at common law wholly void for the same reason that the contingent remainder was originally wholly void—because there was a possibility that as limited it *might* take effect by way of interruption. It is submitted that the formula that after a vested remainder in fee you could have no further remainder in fee, is simply the absolute denial of any rule of possible validity so far as the interest of C was concerned. It was the formula which declared to be wholly void at common law any future interest which *might* take effect by way of interruption as a shifting estate.

If this be the true interpretation of the formula, obviously no reason is produced whatever for the holding of the interest in C in the cases first put to be void at common law, for these interests must take effect, if at all, by way of succession by the expressed

[36]Future Interest in Land, 22 L. Q. R., 250.

declaration of the settlor. They cannot possibly take effect by way of interruption of an interest in possession. No authority, ancient or modern, can, it is believed, be pointed out where the interest is regarded as void at common law. If C's interest must have been valid at common law it must have been classified with remainders. It would clearly not be destructible by any rule of law defeating intent. Who will undertake to say that it was not alienable? Why, then, is it not as proper to call it "vested" as to call a remainder to trustees to preserve contingent remainders, or a remainder in default of appointment, "vested," or at least consciously to associate the interest with what have heretofore been called "vested" remainders? Why should not the nature of C's interest be determined by bringing it also to a pragmatic test? Shall it be called a shifting interest when it cannot possibly under any circumstances take effect by way of interruption of any preceding interest in possession? Shall it be called a contingent remainder when it does not possess the essential characteristic of that interest by being destructible by a rule of law defeating intent? If it cannot be called a shifting interest or a contingent remainder, what is left but to associate it with vested remainders, or to get a new name for it? When we find among vested remainders contingent future interests exactly answering the description of the interest in C, shall we refuse to say that C has a vested remainder, or at least classify and associate C's interest with those interests which we call vested remainders? Shall so rational a course give way before some formula, all rational meaning of which has departed, leaving it with a mere verbal application?

Is it not time that future interests be classified and named with reference to the essential characteristics which they present instead of being left wholly to the incomplete analysis and terminology which they received one, two or three centuries ago? Is it possible that the analysis of even a century ago is so perfect and complete that nothing more can ever be added to it? Did it crystallize so perfectly then that we are helpless to exercise our reason now? Is all hope of progress at an end? My endeavor to analyze the essential characteristics of remainders, with reference to their classification, into those that are vested and those that are contingent, is a conscious effort to put results and realities before names, and to apply names without fear to those interests which bear the same essential characteristics. If this causes strange sounding application of accepted terminology, it argues against the soundness of the

terminology, not against the analysis. If terminology does not fit sound analysis, by all means let us have a new terminology, or at least abolish the old. Let it not be presumed, however, that a bad analsyis must be adhered to in order to give countenance to the terminology upon which it is founded.

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The following table will illustrate in a summary way the proposed division of remainders into those which may properly be called "vested" and those which may properly be called "contingent":

VESTED REMAINDERS.				CONTINGENT REMAINDERS.
A.	B.			C.
Future interests after a particular estate of freehold, which are sure to take effect in possession, and when they do, must so take effect by way of succession:	Future interests after a particular estate of freehold, which, while not sure ever to take effect in possession because subject to a condition precedent to doing so, are bound by the express terms upon which they are limited, to do so, if at all, by way of succession:			Future interests after a particular estate of freehold, which, if they take effect as expressly limited, may do so by way of succession or interruption, according as the event upon which they are limited happens before or at the time of, or after the termination of the preceding interest, but which, according to a rule of law, must take effect by way of succession, or fail entirely:
	(*x*) Condition precedent expressed as subsequent in form:	(*y*) Condition precedent expressed as precedent in form:		
		(*m*) Remainderman who takes if anybody does is *in esse*:	(*n*) Remainderman not *in esse*:	
(1) Remainder vested in the sense of not being destructible by a rule of law defeating intent (*not disputed*).	(1) Remainder vested in the sense of not being destructible by a rule of law defeating intent (*not disputed*).	(1) Remainder vested in the sense of not being destructible by a rule of law defeating intent (*obviously cannot be disputed: authorities sustain it*).[1]		(1) Contingent remainder in the sense of being destructible by a rule of law defeating intent (*not disputed*).
(2) Remainder vested in the sense of being alienable *inter vivos* (*not disputed*).	(2) Remainder vested in the sense of being alienable *inter vivos* (*not disputed*).	(2) Remainder vested in the sense of being alienable *inter vivos* (*apparently disputed. Authority calls these interests "vested" whether they are alienable or not*)[2].	(2) Remainder inalienable solely because of inherent practical reason that remainderman is not *in esse*, and this fact does not prevent the remainder from being called "vested" (*disputed*).	(2) Contingent remainder in the sense of not being alienable *inter vivos* (*not disputed*).

[1] *Supra.* [2] *Supra*

RAILWAY VALUATION—IS IT A PANACEA?

There seems to be a growing tendency in exalted quarters to regard the propaganda of railway valuation as a panacea for all the ills of the present railway situation, in so far as it involves the incidence of rates upon the shipping public. The physician of experience is prone to look upon a panacea with misgiving and to regard its sponsor as a quack. Perhaps, therefore, one may be absolved from a charge of treason if he proposes a merely academic analysis of the nostrum and an investigation as to its efficacy as a remedy.

The need of such a universal physic is the natural result of the attempt to confer upon commissions—Federal and State—the rate-making power. Judge Cooley, as a member of the Interstate Commerce Commission, characterized it as a "superhuman task" for that body to make the rates to govern the transportation of interstate commerce. Since that time the country's railroad mileage has steadily grown until now it totals the impressive figure of two hundred and twenty thousand miles. It is therefore manifest that there is sorely needed for the prompt despatch of this business a rule of thumb of easy application which shall serve as a criterion in all rate questions coming before the commissions.

Coupled with this need of the commissions, the very general superstition that under the guise of freight tolls the railways levy tribute on the public for the payment of dividends on watered stock, has contributed to the popularity of the new doctrine promulgated by our present-day statesmen. A general reading of the last compilation of Statistics of Railways[1] by our Interstate Commerce Commission would do much to dispel this superstition, and substitute in its stead a conviction that the shippers of this country are getting their transportation services without special reference to the nominal dollar capitalization of the railroads which furnish such services.

Reduced to its simplest terms the rule of thumb is to the effect that a railroad is not justified in adopting a schedule of rates which as a whole produces a revenue more than sufficient to defray the

[1]The statistics for 1905 show that in that highly prosperous year one-third of the outstanding stock of our railroads received no dividend return whatever, and that the remaining two-thirds received an average of less than six per cent.

running expenses and yield a "fair interest return upon the fair value of the property employed in the enterprise."[2]

This simple rule is a pitfall in itself, for it gives us no clue as to what is to be considered a "fair interest return." Shall it be less than the company defendant is obligated by contract to pay upon its bonds?[3] Shall it fluctuate with the money market?[4] Shall it be so fixed as to produce fairly uniform results in years of depression and prosperity.[5] Shall it be governed by the hazards of the undertaking[6] or based upon the conditions upon which governments can conduct such an enterprise?[7] These embarrassing questions indicate some of the fundamental difficulties at the outset; but in order that we may be perfectly fair to the doctrine in our discussion let us assume that a "fair interest return" at the present time could be conceded to be six per cent.

We shall find, however, that we have slurred over this difficulty only to be confronted by another. How shall we agree upon the "fair value of the property employed in the enterprise"? Shall it be based upon the outstanding capitalization? The whole populace shouts a negative in one loud chorus, and in this the Supreme Court agrees.[8] Shall the original investment control? It would if the government had built the lines from the proceeds of bond sales.[9] Can we give the railroad companies the benefit of the unearned increment and use the present value of the plant as a standard?[10] Or shall the fair return be computed upon the cost of reproducing the road in its present condition at present prices?[11]

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[2]For discussion of the general proposition stated negatively and affirmatively see Reagan *v.* Farmers' Loan & Trust Co. (1893) 154 U. S. 362; Smyth *v.* Ames (1898) 169 U. S. 466; St. L. & S. F. Ry. *v.* Gill (1895) 156 U. S. 649.

[3]C. & N. W. Ry. *v.* Dey (1888) 35 Fed. 866.

[4]Steenerson *v.* Great Northern Railway (1897) 69 Minn., 353.

[5]*Re* Advance in Freight Rates (1903) 9 I. C. C. Rep. 382.

[6]Canada Southern Ry. *v.* International Bridge Co. (1883) L. R. 8 A. C. 723.

[7]Cotting *v.* Kansas City Stockyards Co. (1901) 183 U. S. 79.

[8]Dow *v.* Biedelman (1888) 125 U. S. 680; Smyth *v.* Ames (1898) 169 U. S. 466; see also Grain Shippers Ass'n. *v.* I. C. Ry. (1900) 8 I. C. C. Rep. 158; Danville *v.* Southern Ry. (1901) 8 I. C. C. Rep. 409.

[9]Brymer *v.* Butler Water Company (1897) 179 Pa. 231; Capital Gas Light Co. *v.* Des Moines (1896) 72 Fed. 829; Milwaukee E. R. & L. Co. *v.* Milwaukee (1898) 87 Fed. 577.

[10]San Diego L. & T. Co. *v.* National City (1896) 74 Fed. 79; Brunswick & T. W. Dist. *v.* Maine Water Co. (1904) 99 Me. 371.

[11]Steenerson *v.* Great Northern Railway (1897) 69 Minn. 353; Metropolitan T. Co. *v.* H. & T. C. R. R. (1898) 90 Fed. 683.

Let us ignore these puzzling questions, and in order to facilitate the discussion of the ensuing problems premise that a referee has in each case settled "the fair value of the property."

With these preliminary difficulties overcome, it may be conceded, for the sake of argument, that such a rule is of substantial assistance in determining the reasonableness of the rates of public service corporations whose operations are in their nature localized within a single jurisdiction, and whose activities are in other respects less complex than those of the great railroads. There is no difficulty in perceiving the possibilities of the direct application of such a recipe to questions involving the rates of a local water,[12] gas,[13] or traction company,[14] a warehouse enterprise,[15] or stockyards business.[16] In those cases the problem is relatively simple, there is no separation of business into state and interstate, and the defendants are purveyors to a single given locality, furnishing an ascertainable number of units of fairly uniform character to the various patrons in the locality. In one case it is transportation at a flat rate, in another gallons of water, and in another cubic feet of gas. After the filing of the referee's report as to the "fair value of the property devoted to the public use" in such cases, and making allowance for running expenses and depreciation, it needs only the application of the multiplication table, using our agreed six per cent. as the multiplier, to arrive at a conclusion as to the reasonable total revenue to be allowed a defendant company. Then to learn whether an individual rate is reasonable it is only necessary to divide the total revenue by the total number of units sold within the period under investigation. The quotient represents the reasonable rate and if the prevailing rate is higher it can be reduced so as to conform to that quotient without resulting in confiscation within the meaning of the Federal constitution.

It is true that the foregoing is a rather roseate description of the simplicity of such cases, as one can learn from a perusal of the paper book in the gas litigation now pending in this city; but granting the usefulness and simplicity of the rule in these cases does it warrant the hope that it can be practically invoked in the solution of present-day rate problems as they actually arise on the

[12]Brymer *v.* Butler Water Co. (1897) 179 Pa. 231.

[13]Consolidated Gas Co. *v.* Mayer *et al.*, now pending.

[14]Milwaukee E. R. & L. Co. *v.* Milwaukee (1898) 87 Fed. 577.

[15]Munn *v.* Illinois (1876) 94 U. S. 113.

[16]Cotting *v.* Kansas City Stockyards Co. (1901) 183 U. S. 79.

great railroad systems of this country? The theorists say it can, and perhaps it can. It may be profitable to examine, from the standpoint of preparation for trial, three cases, involving railroad rates, and seek in that manner to ascertain the real contribution to practical results afforded by the rule.

In the first two cases we shall assume the railroad or railroads to be located entirely within the boundaries of a single State and physically disconnected with any other railroad so that the traffic will be necessarily confined to intrastate business. This assumption will greatly simplify our consideration of the cases, by eliminating any conflict of jurisdiction and many difficulties of accounting.

The first case results from a request to prepare for the defense of a so-called two-cent-fare law, which has been attacked by one of the railroads of the hypothetical State, on the ground that it is confiscatory and therefore unconstitutional. We find the simple rule and begin the preparation with enthusiasm. The defendant railroad has reported its *gross passenger revenue* under oath to the State taxing authorities. The referee has reported on the fair valuation of the entire railroad system. We are almost ready to multiply something by six when it suddenly occurs to us that we have not separated the passenger business from the other business of the railroad except in the matter of gross receipts. Two questions loom large. What is the value of the portion of the property of the railroad devoted to the passenger business? How much of the total annual disbursements of the company are to be attributed to the conduct of passenger transportation?

It is, of course, fundamental that the freight business and passenger business must be considered separately in such cases and segregated.[17] One would anticipate that the method for making the necessary segregation of the two forms of business had been worked out in detail by the sponsors of the panacea. But they have neglected this detail. It is, of course, a simple matter to classify such items of investment as passenger stations, cars and engines, and such items of daily expense as the wages of ticket sellers and passenger train crews; but it is impossible to say what part of the investment in right of way, bridges, rails and ties, and what part of the annual expenditure for their maintenance should

[17]Chief Justice Mitchell of the Supreme Court of Pennsylvania, in the prevailing opinion in Pennsylvania R. R. Co. *v.* Philadelphia County, Case No. 346, announced January 20, 1908, and not yet reported; but see also the dissenting opinions of Mestrezat, Potter and Stewart.

be charged to the passenger business. The freight trains and the passenger trains both use the same right of way and tracks, are moved by the same dispatchers, use the same set of block signals, and the two branches of the business are in the main conducted by the same general officers. Railroad experience indicates that while about two-thirds of the annual expenses of a railroad can be definitely allotted to the proper branch of the service, the other one-third cannot be definitely assigned exclusively to the one branch or the other.

Various methods have been adopted by various railroads and commissions for arbitrarily making such an assignment. Some divide the unassignable disbursements in the ratio indicated by the gross revenues of the two branches of the business, others on a "wheelage" basis, and still others on the basis of locomotive mileage. The Interstate Commerce Commission has manifested its preference for a division in the proportion which the respective train mileage bears to the total mileage of train earning revenue. Without explaining the various methods in detail, it is obvious that the result must depend upon the method adopted and that each method is arbitrary. It is quite as obvious that each side in a litigation will adopt the method which will make the best showing in support of its contentions, and that neither will be able to give any logical reason for the basis adopted. The Interstate Commerce Commission's rule of division was urged by distinguished counsel in the most recent litigation, involving the question in our neighboring State of Pennsylvania, and seems to have been adopted by Judges Wilson and Audenried as the basis of their decision,[18] and approved by the State Supreme Court on appeal.

The learned Attorney General, nevertheless, objected that the adoption of such a method invited the court to leave the domain of fact, where it has to guide it the testimony of witnesses who have seen the things that they describe, and to enter the realm of speculation, where all evidence is mere guesswork and where probability is the nearest approach to reality and truth that can be found. These are strong words of condemnation, but the utterly vague and nebulous state of the law on the point, and the absence of any fixed or definite principle of division seem to warrant the criticism. Is it fair for the sponsors of such a "half-baked" rule to make such extravagant claims in its behalf and subject the prop-

[18]Penn. R. R. Co. *v.* Philadelphia County, Case No. 5312, March Term 1907, Court of Common Pleas, No. 4, County of Philadelphia.

erty of railroad security holders to attack with no better test of confiscation than that to be derived from use of such a formula? It is almost useless in determining the reasonableness of the entire rate schedule for either of the great divisions of a railroad's business—passenger or freight—because it is impracticable under present conditions to entirely separate the one branch from the other and so make possible the application of the recipe.

The second case may be well illustrated in an attempt to use the fetich in order to determine the reasonableness of a single rate, as for example the carload rate on wheat from Buffalo to New York. Given a referee's valuation of each of the half dozen trunk lines at a figure different from the other five, and a report as to the annual expenses and revenues of each line varying in the same manner (as would necessarily be the case), we do not need the experience of litigation to assure us that the rate would not be different on any one line from what it was on all the others. The one element of competition would prevent any application of the theory discussed in the introductory paragraphs of this article. But such a case aside, it is so apparent as to be axiomatic that such a formula is of no practical use in determining how a reasonable aggregate revenue of a company should be distributed among the nine or ten thousand articles of commerce moving in railroad traffic in shipments varying as they do one from another in value, bulk, risk of carriage, weight, distance carried, expense of handling, volume of traffic, and numerous other characteristics influencing the rate.[19]

These two cases indicate that the scope of the proposed test is limited to those cases where the reasonableness of the total revenues of a carrier or the rate schedule as a whole is called in question. Such a criterion would justify its existence, however, if it served as an accurate administrative guide to State and Federal Commissions in their considerations of the rate schedules as a whole. Will it prove of service even in that limited sphere under existing conditions of conflict of jurisdiction between State and Federal govern-

[19]On the numerous, varying, and complex features considered as influencing the determination as to the reasonableness of single rates, see Delaware State Grange *v.* N. Y. P. & N. Ry. (1891) 3 Int. Com. Rep. 554; Grain Shippers *v.* Illinois Central R. R. (1899) 8 Int. Com. Rep. 158; *Re* Rates upon Food Products (1890) 3 Int. Com. Rep. 93; C. & G. T. Ry. *v.* Wellman (1892) 143 U. S. 339; T. & P. Ry. *v.* Interstate Commerce Commission (1896) 162 U. S. 197; L. S. & M. S. Ry. *v.* Smith (1899) 173 U. S. 684; Union Pacific Ry. *v.* Goodridge (1893) 149 U. S. 680; *Re* Advances in Freight Rates (1901) 9 Int. Com. Rep. 382.

ments? Let us seek to apply it to the Pennsylvania Railroad running as it does through a dozen States. Assume that each of the States and the Federal Commission have adopted elaborate rate schedules to govern that portion of the company's business within their respective jurisdictions. The company regards each and all of these schedules as confiscatory. A referee in each State has reported on the fair value of the company's property physically situated in that State. The total is a mere matter of addition. It is manifest, however, that the Federal Commission cannot regard the property represented by this total valuation as devoted to the conduct of interstate commerce, even though that be true in the physical sense, because the portion of that property geographically located in Pennsylvania or New York is also used for the conduct of business entirely within the boundaries of those States, respectively, and is to that extent subject to the legislative control of the State where it is situated. The puzzle then is to make a fair division of the entire property of the railroad for jurisdictional purposes between the Federal authority on the one hand and the various States on the other. To take a concrete case, upon the completion of the company's new hundred million dollar terminal on Manhattan Island, what portion shall be regarded as devoted to intra-state business and what portion to interstate business? "For some purposes its property in this State is separate and distinct from its property elsewhere, and out of this property within this State, it is entitled to receive some compensation. Robbing Peter to pay Paul has never received judicial sanction."[20] This division must be made, for the Supreme Court has held that the rates for such transportation as begins and ends in a State must be established with reference solely to the amount of business done by the carrier wholly within such State, to the cost of doing such local business, and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its interstate business, and the value of the property employed in it.[21]

In the case of this great terminal last mentioned it is clear that, while located in the State of New York, no use of it is made in intra-state business, and that the State Commission would be correct in rejecting it in its calculations as to the reasonableness of a schedule of State rates. Passing over the river to the State of

[20] Brewer, J., in Chicago and Northwestern Ry. *v.* Dey (1888) 35 Fed. 866.

[21] Smyth *v.* Ames (1898) 169 U. S. 466.

New Jersey, however, the problem of apportioning this great six-track highway between intra-state and interstate business becomes more perplexing. What proportion of the fair value of this property lying between the Delaware and Hudson Rivers, and what proportion of the annual expenses for taxes, operation and maintenance of ways, structures, bridges and equipment shall be borne by the intra-state business, and what proportion by the interstate business? No one, unless inspired, could say. It would be an unanswerable question even if intra-state trains were run separately from interstate trains, but when one considers that practically every freight train carries both State and interstate shipments, it is apparent that it is simply impossible to say how much of the ties and rails are worn out by each kind of business, or how the cost of labor and fuel employed in the train movement should be divided between the two. Precisely the same insurmountable difficulty prevents any division of disbursements for taxes, insurance, station costs, general office expenses and every other item of outgo. It is a comparatively simple matter to divide *revenue* on the basis of State lines, but it is absolutely impossible to thus divide *disbursements*. Traffic men and accountants may take the stand and testify as to their opinion as to arbitrary divisions of these items of expense, but their testimony must start with and proceed on the assumption of facts which cannot in the nature of things be established. In a nutshell, it seems obvious that the panacea cannot be administered in these cases because it is impossible for any man or set of men to determine the fair value of the property devoted to the business—State or interstate, as the case may be.

With any such rule—or alleged rule—in the hands of State commissions, animated, as many of them are at the present time, by the corporation-baiting spirit, it is easy to see that the owners of railroad securities would be helpless against the piecemeal dissipation of their property if it traversed more than one State, thus necessitating an attempt at a valuation of the railroad devoted to State business and a separate valuation of that devoted to interstate business.

In the three cases considered we have found the proposed formula of no practical value in the solution of the problems because as a condition precedent to the application of that formula it became necessary to divide something which in the nature of things was indivisible. In the first two cases the difficulty is insurmountable. In the third case the difficulty arises from the necessity

of a division by reason of the conflict of jurisdiction between the States and the Federal Government. If the jurisdiction could be lodged in the latter, the questions involving the reasonableness of a railway rate schedule as an entirety would become at least as simple as the corresponding questions involving the reasonableness of the rates of gas, water, and traction companies. This would eliminate the necessity for the impossible attempts at segregation last above discussed, and enable the Interstate Commerce Commission to treat the whole rate schedule of a single railroad as a unit. It would likewise greatly increase the value of a rule now practically valueless in railway rate cases.

This can only be accomplished in one of two ways; either by formal constitutional amendment, or by the sort of constitutional "construction" recently advocated by our Secretary of State. In the light of the violent strife engendered in the Southern States during the past year, by alleged encroachments of the Federal courts upon the prerogatives asserted by the State authorities, there seems to be little prospect of a surrender of jurisdiction through the instrumentality of a formal amendment to the Constitution. On the other hand, there are growing indications of a disposition on the part of Congress and even of the Supreme Court to so "construe" the Constitution as to make it not improbable that they would countenance the assertion by the Interstate Commerce Commission of a jurisdiction over all the rates of railroads engaged in interstate commerce, whether the rates are imposed upon an intrastate or an interstate movement. This would leave the rates of railroads not engaged in interstate commerce subject to the jurisdiction of their respective State authorities, and the rate schedules of such railroads could be treated in their entirety by those authorities. These instances would be very rare.

This tendency to thus "construe" the Constitution may be observed in recent Congressional legislation and decisions of the Supreme Court. It requires but slight circumstances, such as a through billing for example, to induce the view that, although a local carrier confines its share of the carriage to a single State, it is nevertheless engaged in interstate commerce, and the rates for such carriage are subject to the jurisdiction of the Interstate Commerce Commission if it *participates* thus in the carriage of goods through to a destination in another State.[22]

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[22]Norfolk & Western R. R. *v.* Pennsylvania (1890) 136 U. S. 114; Cincinnati, N. O. & T. P. Ry. *v.* Int. Com. Com. (1896) 162 U. S. 184.

The same underlying principle seems to have controlled the Supreme Court in their recent decisions upon the so-called "Safety Appliance Act,"[23] which followed logically would indicate the conclusion that the national power to regulate commerce is broad enough to regulate the employment, duties, obligations, liabilities, and conduct of all persons engaged in interstate commerce. If it can reach such details of operation, why should it hesitate to regard the entire rate-schedule of a great trunk line railroad as an instrumentality of interstate commerce, no matter what its local ramifications? Upon what less comprehensive principle could the Supreme Court have twice enforced the "Safety Appliance Act," undisturbed by a doubt of its constitutionality?[24]

Congress, the legislative branch, has adopted its own interpretation of its powers to legislate concerning the conduct of interstate commerce. In days gone by the power was sparingly exercised, but in more recent times there has been a growing tendency on the part of that body to exercise the power in various and numerous acts which have been spread upon the statute books. Thus the last amendment to the so-called Interstate Commerce Act requires not only the publishing and filing of interstate rates, recognized as such, but also that short intra-state roads must likewise publish and file all their "separately established rates, fares, and charges *applied to* the through transportation."[25] The same amendment also seeks to control such local affairs as terminal charges, storage charges, icing charges, and the terms to govern the construction and operation of private side-track connections with local industries. Other acts have provided drastic regulations as to the care of live stock[26] and prohibitions against the transportation by railroads of live stock affected with contagious diseases.[27] Similar legislation has been enacted prohibiting interstate transportation of carcases, and meat-food products which have not been inspected in accordance with the requirements of the act.[28] Perhaps the most interesting laws, however, are those seeking to regulate the relations of master

[23] Act of Congress March 2d, 1893, c. 196 (27 Stat. 531); Act of Congress March 2d, 1903, c. 976 (32 Stat. 943).

[24] Johnson *v.* Railroad (1904) 196 U. S. 1; Schlemmer *v.* Railroad (1906) 205 U. S. 1.

[25] Section 6 of the Act to regulate commerce as amended June 29, 1906 (34 Stat. 584).

[26] Act of June 29, 1906 (34 Stat. 607).

[27] Act of May 29, 1884, c. 60, § 6 (23 Stat. 31, 32).

[28] Act of June 30th, 1906 (34 Stat. 669, 674, 676).

and servant, and create an entirely different tort liability on the part of a "common carrier engaged in * * * commerce, * * * between the several States * * * etc.," toward its employees than that which prevails between other employers and employees.[29] The so-called "Safety Appliance Acts" and their amendments show the same general tendency.[30] Another very interesting series of acts are those like the Erdman law,[31] or of the same general trend, governing contract relations between employers engaged in interstate transportation and their employees, regulating the hours of labor,[32] and enforcing the arbitration of disputes.[33] Because Congress takes this ambitious view of its powers does not necessarily indicate that the Supreme Court will concur in that view. Sometimes they do,[34] sometimes they do not.[35] It does indicate, however, that the law-making branch of the government feels that it has a mission and is willing to embark on any number of experimental voyages of discovery. It probably represents the trend of popular thought on the subject, and our judges, being merely human, will be more and more influenced (unconsciously, perhaps) by that undercurrent of opinion.

That the views of the Interstate Commerce Commission and our national legislators are finding lodgement in the minds of the judiciary may be inferred from a reading between the lines of two of our recent Supreme Court decisions. One of these cases involved the constitutionality of articles 4497 to 4500 of the Revised Statutes of Texas, the material requirement of which is that when the shipper of freight shall make a requisition in writing for a number of cars to be furnished at any point indicated, within a certain number of days from the receipt of the application, and shall deposit one-fourth of the freight with the agent of the company, the latter failing to furnish cars shall forfeit $25 per day for each car not so furnished. The plaintiff in the case sought to recover a penalty under this statute by reason of the defendant

[29]Act of June 11th, 1906 (34 Stat. 232).

[30]Act of March 2d, 1893 (27 Stat. 531); Act of April 1, 1896 (29 Stat. 85); Act of March 2d, 1903 (32 Stat. 943).

[31]Act of June 1, 1898 (30 Stat. 424).

[32]Act of March 4, 1907 (34 Stat. 1415).

[33]Act of June 1, 1898 (30 Stat. 424).

[34]Johnson *v.* Railroad (1904) 196 U. S. 1; Schlemmer *v.* Railroad (1906) 205 U. S. 1.

[35]Howard *v.* Railroad (1908) 207 U. S. 463; William Adair *v.* The United States, Case No. 293, October Term, 1907, United States Supreme Court. Decided January 27, 1908.

company's failure to furnish fifteen stock cars for an interstate shipment of cattle. The Texas Court of Civil Appeals supported the argument of plaintiff's counsel that the transaction was local in its character and disconnected with interstate commerce, as it preceded any delivery of the cattle to the carrier and its receipt of them for transportation on an interstate journey. It upheld the act as a proper exercise of the police power of the State.

Mr. Justice Brown[36] of the United States Supreme Court took a different view of the question, when the case came before that tribunal. He said:

"The exact limit of lawful legislation upon this subject cannot in the nature of things be defined. * * * The validity of local laws designed to protect passengers or employees or persons crossing the railroad tracks, as well as other regulations intended for the public good, are generally recognized. * * * While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers * * * we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the State and *amounts to a burden upon interstate commerce.*"

In the other case[37] the Southern Railway had had a dispute with one of its patrons over demurrage charges, and in consequence gave notice to the patron that after a given date it would cease to make delivery of freight upon the patron's private spur siding and would tender delivery of future consignments on the company's public team track. After receipt of this notice the patron ordered four cars of coal from neighboring States which upon their arrival the railroad company placed upon their public team track, and there tendered delivery. This delivery was declined and a delivery upon the private spur siding demanded by the patron, and this demand was followed by complaint to the State Commission, which ordered the railway company to make delivery of the cars on the siding referred to. The company declined to obey the order and also sought to enjoin the Commission from bringing any action to recover the statutory penalties incurred by such disobedience.

The third question involved in the case was whether the order of the State Commission and the statutes on which the same was based were void because in conflict with the commerce clause of

[36]Houston & Texas Central Railroad Co. *v.* Mayes (1905) 201 U. S. 321.
[37]McNeill *v.* Southern Railway Company (1905) 202 U. S. 543.

the Constitution and the act of Congress to regulate commerce. The Supreme Court held that they were. Mr. Justice White said:

"It is certain that any regulation of such subject made by the State or under its authority *which directly burdens interstate commerce* is a regulation of such commerce and repugnant to the Constitution of the United States. * * * the particular application of those regulations with which we are here concerned was a direct burden upon interstate commerce and void. * * * the order manifestly imposed a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce."

The foregoing cases are not introduced as illustrating any underlying principle of law, but rather as indicating the extent to which the Federal courts will practically go toward bringing under their jurisdiction questions which seem to be purely local in their nature—matters preceding or succeeding the movement of goods in interstate commerce quite as distinctly, it would seem, as their manufacture or their sale. Will not the distinct trend of these courts in future be toward regarding almost every conceivable State regulation as being a *burden upon interstate commerce?* It seems highly probable.

For example, the recent two-cent passenger fare law of Pennsylvania required the Pennsylvania Railroad to make its rate from Pittsburg to Philadelphia (the intermediate route lying entirely within the State) two cents per mile for the total distance. The inevitable result was that the Baltimore and Ohio Railroad was compelled to make precisely the same rate, although its route between these two points is interstate—traversing as it does the states of Pennsylvania, West Virginia, Maryland, and Delaware and the District of Columbia. This is not a sporadic example, but on the contrary is typical of what happens whenever a State prescribes a schedule of rates for intra-state business. Will it come to be regarded as burdening interstate commerce?

The Hepburn Bill conferred upon the Interstate Commerce Commission the rate-making power, and about a year ago the Commission announced that it would consider a through rate, which was higher than the sum of the locals between the same points, as *prima facie* unreasonable.[38] From this it results that for such time as the Ohio and Pennsylvania two-cent fare statutes remained in force those States were fixing the interstate rate between Cin-

[38]Interstate Commerce Commission Tariff Circular No. 6-A, November 16, 1906.

cinnati, Ohio, and Philadelphia, Pennsylvania, at two cents per mile for the seven-hundred-mile journey. Would not this directly affect and burden interstate commerce?

As a result of the Pennsylvania law the intrastate rate from Pittsburg to Philadelphia via the Pennsylvania Railroad must be two cents per mile. The rate from Pittsburg to Camden, New Jersey, just across the river from Philadelphia, being an interstate rate, might be three cents per mile in the absence of other complications. The first complication is a practical one—all sensible passengers would purchase a local ticket for the trip within the State and buy a ferry ticket to complete the interstate trip across the river. The second complication is the Interstate Commerce Commission's tariff circular above noted which makes the reasonable rate *prima facie* the sum of the locals. A third complication is that to make such a discrimination in rates between Pittsburg and Philadelphia on the one hand, and Pittsburg and Camden on the other would constitute a glaring violation of that section of the Interstate Commerce Act inhibiting discrimination against localities. The State rate cannot be increased; the inevitable result will be that the interstate rate must be decreased. But such an influence does not cease there, it goes on and on disturbing other rates dependent thereon, to the remotest points to which railroads run. The New York State Commission by lowering the *intrastate* grain rates over the New York Central Railroad from Buffalo to New York, would not only affect the *interstate* rates in force on competing lines, such as the Erie and Lackawanna, which in connecting those two cities traverse other States than New York, but would inevitably affect the interstate grain rates from the Missouri River territory to the Gulf ports, and probably from points in the far West to Pacific ports. Such a rate order would naturally and inevitably amount to a burden upon, and an interference with, interstate commerce. Indeed, it would certainly present a more striking instance of direct interference than the cases on car-service regulations decided by the Supreme Court and already discussed.

If any practical end were served by dividing the jurisdiction over rates between the Federal Government and the fifty State sovereignties the resulting perplexities might be tolerated, but the interests of the States are so slight as to be negligible. During the past year the writer had occasion to use the testimony of several traffic experts as to the ratio of intrastate to interstate traffic in the State of New Jersey. Owing to the inherent complexities of the

question no reliable statistics were available, but the consensus of expert opinion was that the intrastate business did not exceed three per cent. of the whole. In view of this practically negligible percentage it does not seem improbable that the Supreme Court may progressively hold, first, that the Federal commission has exclusive jurisdiction over such intrastate rates as affect even remotely interstate rates, and second, that the rate schedule of any interstate railroad shall, in its entirety, be regarded as an instrumentality of interstate commerce, much as its equipment would be under the doctrine of the *Johnson* case cited above.

On broader grounds one of our Federal Judges has prophesied[39] the practical exclusion of State commissions from the field of rate-making by the gradually legalized encroachment of the Interstate Commerce Commission without the aid of a constitutional amendment. Among other things he said:

"In commerce, as in politics, State governments will represent State interests. * * * The severest critic of railroads cannot deny that their policy has been splendidly national, and the most potent single factor in the creation of our vast domestic commerce. * * * Localism is to speak not by petition, but by statute. Under this regime as governmental control increases in efficiency, the irrepressible conflict between local and national interests will increase in directness as well as in the frequency of its exhibition and the intensity of the passions aroused. Such a conflict must in the end result in the complete supremacy of one authority or the other. * * * How far may the national government go in the control of those matters which have become in fact national? * * * It presents a case to which the separate States are incompetent and in which the harmony of the United States may be interrupted by the exercise of individual legislation! * * * As to railroads there is no more reason why they should be subject to a divided authority than there is in the case of navigation. * * * The railroad is a unit, its activities are national, and it ought to be subject solely to national authority. Divided control is inefficient in protecting the public, and grossly unjust in the burdens which it places upon the carrier. * * * Protection to the public and justice to the carrier alike unite in the demand for a single governmental control. * * * If the railroad as an instrument of commerce can only be dealt with justly and efficiently by a single authority the Federal Government may assert and maintain its exclusive jurisdiction. * * * The subject is national, and the Federal Government with its national outlook can

[39]Address on "The Nation and the Constitution," delivered at the thirtieth annual meeting of the American Bar Association by Hon. Charles F. Amidon.

by organized investigation and accumulated experience acquire the skill and knowledge necessary for the just and efficient regulation. * * * A uniform authority in the field of interstate commerce and industry will be found as beneficent to-day as it was discovered to be in the field of finance and banking as the result of our first economic conflict. * * * We ought to look squarely at the nature and extent of our commerce and industry. Are they national? Ought they to be regulated by one or by fifty different sovereignties? If in their nature and extent they are national and * * * ought to be subject to a single authority, then we ought not to hold back from the exercise of the necessary power simply because it would add to the activities of the Federal Government."

If impressed by the foregoing doctrine and recognizing each railroad system as a unit, courts adopt a construction of the Constitution logically applicable to the situation, and decide that Federal jurisdiction over interstate commerce carries with it as a corollary control over all the rates of a railroad engaged in such interstate commerce, considerable progress will have been made in the simplification of the rate question. Then the principle under discussion will become of real value in the consideration of such questions. It will be a sword in the hands of the government and a shield in the hands of the railroads ot the land. In the nature of the case the result will not even then help in the solution of the first or second problem considered in this discussion. Indeed, wherever the necessity for attempting impossible divisions of earnings and disbursements is involved the fetich loses its potency. It is only when the necessity for such divisions is eliminated that the panacea may be administered with anything like sure results. Even in the simplest of such cases the complexities of the railroad rate problem will dispel the illusion that such a formula can be applied with the same facility as in cases involving the rates of gas, water, or traction companies.

JACKSON E. REYNOLDS.

NEW YORK.

RECOVERY IN NEW YORK OF INTEREST IN EXCESS OF SIX PER CENT. PAID BY BROKERS ON MONEY BORROWED TO PURCHASE AND CARRY STOCKS ON MARGIN.

The usual transaction incident to the purchase, on margin, of stocks by a broker for his customer is substantially as follows. The customer "A" orders the broker "B" to purchase stocks of the value, for example, of $100,000. At the time of the order, the customer furnishes a margin of ten per cent. There is no written contract relating to the means by which the purchase is to be carried out.

The broker goes upon the Exchange and contracts to buy the desired stocks. Upon the following day, at 2 o'clock, the selling broker delivers the stock to the purchasing broker, who, in return, delivers a check for the purchase price. The check may be certified when delivered, or the messenger of the selling broker may have it certified. At the time the check is certified, B may or may not have funds in the bank with which to meet it; that is, the bank may certify the check because there are funds to meet it, or because B's credit is good—the bank perhaps holding a demand note for a large amount, given by B as security for such over-certifications.

B takes the stock which he has just purchased for A and places it among his other securities hypothecated with the bank, thereby becoming entitled to a loan on said stock up to such proportion of the stock's value as the bank will advance. The proportion is usually eighty per cent. The money thus obtained may be used by B to make good the account from which the check was drawn to purchase A's stock, or it may be used by him in the purchase of stocks on margin for other customers.

The interest asked by the bank upon the loan by it to B on A's stock may be six per cent. or less, or it may be the call rate of the day. Suppose that the rate is considerably higher than six per cent., and that the broker in rendering his monthly statement to the customer, seeks to charge the customer with the interest paid. Can this be done, and, if so, upon what theory?

The opinion expressed in Dos Passos on Stockbrokers, at page 270, is as follows:

"In respect to the liability of the client to pay interest, it is a well understood rule of stockbrokers to charge him legal interest upon the amount advanced by the broker in the purchase of the stock; it is also the usage of the brokers to charge the client with any extra interest which the broker is compelled to pay for carrying the stocks of the former caused by the stringency of the money market. Both of these usages are reasonable and it does not seem to be difficult to sustain them by authorities."

An examination, however, of the authorities cited in support of the text does not disclose any theory, free from difficulties, upon which to justify such recovery. The only cases cited which are in point are *Smith* v. *Heath*[1] and *Robinson* v. *Norris*.[2]

In the first of these cases it appears from the opinion of the Court that

"The moneys advanced by defendants *to carry the stock* in question were borrowed by them *at the request* and for the use of the plaintiff * * * He (the customer) agreed to pay such extra interest and may be said to have borrowed from the defendants the amount necessary for that purpose."

It seems that the original loan for the *purchase* of the stock was made at non-usurious rates. In order to carry the stock, however, it was necessary to raise more money, which money was obtained from third persons, with the customer's assent, and possibly with his written authorization. The rates paid were apparently usurious, but it was intimated that they might be recovered on the theory, as expressed on page 126, that

"all the transactions in reference to the charge and payment of such extra interest were had and conducted, not as between the plaintiff (customer) and defendants (brokers), but between third parties and the defendants as *agents* for the plaintiff."

The only point, however, decided in the case was that the customer could not enjoin the brokers from proceeding upon his note, given to them in part for a valid debt and in part for a debt alleged to be invalid because of usury. The remainder of the opinion was dictum.

Giving weight, however, to the dictum, it must be noted that the only loans questioned for usury were, first, those obtained to

[1](1871) 4 Daly 123. [2](1875) 6 Hun 233.

carry the stock, and, second, those obtained to pay interest on money used to carry the stock. Is this case authority for the proposition that the broker can charge the customer the extra interest paid on money borrowed to purchase the stock? Probably it is, if it be authority at all and if it be conceded that the broker acts merely as agent, the loan being made by the third person to the customer. The agency, however, which was said to have existed in this case, may have resulted from an express written authorization, and the case, therefore, is not a decisive authority in cases where no express authorization exists.

In the second case, *Robinson* v. *Norris*,[3] it was held that where a broker has been authorized by his principal to borrow money in order to carry stocks for him and where in borrowing the money he has been compelled to pay to other persons, as commissions, sums exceeding those allowed by law, he can recover the commissions so paid, unless the principal promptly objects.

This case, as so reported, affirms *Robinson* v. *Norris*.[4] It appears from the statement of that case that the broker, at the beginning of the transaction, had informed the customer by letter that it was his custom to charge to his customers, in proportion to their debit balances, such expenses as he might have to incur, by reason of the stringency of the money market, in obtaining the loans for the benefit of his customers. It further appears that the customer had signed an agreement authorizing, to some extent, the payment by the broker of commissions for procuring loans, and, furthermore, that for several months prior to the transactions so questioned, the broker, without objection from the customer, had charged the customer with such commissions.

It is clear, therefore, that in this case, also, certain additional facts were present which are not present in the ordinary transaction as above supposed.

In support of his text, above quoted, Dos Passos also cites *Esterly* v. *Cole*.[5] The question in this case was whether certain merchants could charge *any interest at all* on an account for goods sold and delivered. It was held that they could charge interest, because this was the general usage of the trade and because parties having knowledge of the usage were presumed to have contracted with reference to it. The effect of usage will be considered later in this article, but it may be said here that, should it be sought to charge interest in excess of six per cent. upon a loan *from the*

[3]*Supra.* [4](1874) 51 How. Pr. 442. [5](1850) 3 N. Y. 503.

broker to the customer (not a call loan),[6] or to charge commissions exceeding in amount those allowed by Revised Statutes, Pt. I, Ch. 20, Title 19, no usage, however well known, would be sufficient to overthrow the illegality and to entitle the broker to recover such interest or commission.

It is thus apparent, with all respect to the opinion of Mr. Dos Passos, that there are many difficulties in sustaining the recovery by the broker of the charges under consideration.

There are four possible theories upon which the broker may seek to base his right to recover the interest paid by him in excess of six per cent.

First: Upon the theory that the loan is from the bank *to the customer*, and that the customer, in paying the high rate of interest, is paying a *call rate* to the bank, through the broker, as agent.

Second: Upon the theory that the interest in excess of six per cent. is chargeable as a *commission.*

Third: Upon the theory that the advancement is a *call loan from the broker* to the customer.

Fourth: Upon the theory that the interest in excess of six per cent. is an expense necessarily incurred by the broker in order that the *broker* may make the loan to the customer.

Let us consider the possibility of succeeding by the first theory.

It has frequently been held that where a broker has purchased stocks on margin, he holds the stocks as pledgee.[7] The broker, however, still continues to be, in some respects, an agent also.[8]

The principal difficulty, however, in urging that the broker, as agent for the customer, procures the loan from the bank to the customer is the fact that practically all the decisions in point in this State hold, by implication, that in the ordinary purchase by the broker on margin the loan is made by the broker to the customer.

In *Markham* v. *Jaudon*,[9] which is, perhaps, the leading case in this State upon the relationship in question, the Court says, at p. 240:

"The position of the broker is twofold. Upon an order of the customer, he purchases the shares of stocks desired by him. This

[6]See Robinson *v.* Norris, *supra.*

[7]Content *v.* Banner (1906) 184 N. Y. 121; Rothschild *v.* Allen (1904) 90 App. Div. 233.

[8]Zimmermann *v.* Heil (1895) 33 Supp. 391, affd. 156 N. Y. 703; see also Taussig *v.* Hart (1874) 58 N. Y. 425, and McNeil *v.* Bank (1871) 46 N. Y. 325.

[9](1869) 41 N. Y. 235.

is a clear act of agency. To complete the purchase, he advances from his own funds, for the benefit of the customer, ninety per cent. of the purchase money. Quite as clearly, he does not in this act as an agent, but assumes a new position."

In *Tompkins* v. *Morton Tr. Co.*,[10] the Court said (at p. 278) as to customers who had bought on margin:

"It must be assumed, therefore, that the securities deposited by H. & F. (brokers) with the Morton Trust Company (which had loaned on security to the brokers) as security for the loans belonged to other customers, and that * * * H. &. F. held the stocks and securities as collateral security for advances or loans made by H. & F. to the several defendants named."

There are many other cases in which similar language is used, and in no case, apparently, has the usual advance by the broker upon the purchase price of the stock been regarded as a loan from the bank to the customer, except in those cases where it appeared that the customer had expressly authorized the broker to go and borrow money for him. On the other hand, it has not been squarely held that the loan is not made by the bank to the customer.

It may be contended that usage will take the place of express authorization. This may be true, if the usage be to borrow as agent for the customer from the bank. The practice, however, seems to be for the broker to lend his own funds to the customer. This absolutely precludes the idea that the same money is loaned from the bank to the customer, unless it be urged that the broker, pending the loan from the bank to the customer, has temporarily advanced his own money, and that he repays himself with the money obtained from the bank.[11] If this be the case, however, the customer's debt to the broker (*i. e.*, for the advancement on the purchase price) is terminated when the broker repays himself. Such a theory seems too novel to be acceptable.

Furthermore, it must be borne in mind that the market value of the securities pledged by the broker usually exceeds the amount which the bank loans upon them. So, if A's stock is worth $100,000 and the bank loans $80,000 upon it—A having put up a margin of $10,000—there still remains $10,000 which could in no way be regarded as a loan from the bank to the customer.

Upon the second theory, the excess of interest is regarded as a commission.

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[10] (1904) 91 App. Div. 274, affd. 181 N. Y. 578.

[11] See Smith *v.* Heath, *supra.*

If it be urged, however, that it is a commission to the broker for obtaining the necessary money, the obstacle is the fact that it is made illegal by statute for a broker to charge any such rate for procuring a loan. Revised Statutes, Part I, Ch. 20, Title 19, Section 1, as amended by L., 1895, Ch. 467, provides:

"No person shall, directly or indirectly, take or receive more than fifty cents for * * * procuring the loan or forbearance of one hundred dollars, and in that proportion for a greater or less sum, except loans on real estate security."

Thus, even if it be assumed that the broker does procure the loan from the bank to the customer, his commission for procuring such loan can be the sum only which is allowed by such statute.

The position may be taken that the excess of interest is a commission paid by the broker to the bank and is thus an authorized expenditure in a principal's behalf. It is held in *Robinson* v. *Norris*[12] that a broker can recover commissions paid to third parties unless the customer promptly objects. The case does not decide, however, whether there can be a recovery if the customer promptly objects. Nor does it appear in that case whether the loan was made to the broker or to the customer. Furthermore, the charge between the bank and the broker is so manifestly interest that to regard it as a commission is scarcely reasonable.

The third theory is the one upon which the advancement by the broker is regarded as a call loan.

Laws of 1882, Ch. 237, Section 1, provides:

"In any case hereafter in which advances of money, repayable on demand, to an amount not less than $5,000, are made upon * * * certificates of stock * * * pledged as collateral security for such repayment, it shall be lawful to receive or to contract to receive and collect, as compensation for making such advances, any sum to be agreed upon in writing by the parties to such transaction."

It is not easy, however, to establish the proposition that the advancement in question is a call loan, even assuming that the amount involved is over $5,000.

In the first place, it is essential to a call loan that the money be repayable on demand. I have not been able to find any case in which the meaning of a loan repayable on demand is explained. By analogy, however, to the case of a negotiable instrument payable on demand, it would seem that such a loan must be one which

[12] *Supra.*

is due at any time after it is made. In *McMullen* v. *Rafferty*[13] the Court, in holding that the statute of limitations runs against a demand note from its date, uses the following language:

"The word 'demand' is not treated as part of the contract, but is used to show that the debt is due."

The advancement, then, by the broker to his customer is not repayable on demand unless the broker can, at any time, demand that the customer take the stock off his hands by paying the ninety per cent. advanced.

Some cases indicate that the broker must carry the stock for the customer as long as the customer desires, provided that the required margin is kept up.[14] One case holds that agreement must determine whether the stock is to be carried as long as the customer desires (the margin being kept up) or as long as either desires.[15]

In the decisions, however, defining the rights of brokers and customers in regard to *short sales*, the rule is as stated in *Hess* v. *Rau*:[16]

"The former (broker) agrees to carry the stock a *reasonable* time, so as to afford the customer an opportunity to realize the expected profits, while the customer on his part is bound to keep his margin good, so as to secure the broker against loss."

The ground of these decisions is set forth in *White* v. *Smith*:[17]

"It is part of the bargain that the broker shall carry the stock for a *reasonable* time, for in no other way can the object of the parties be effected."

While, as stated, the transactions in these cases were short sales, the reasoning seems equally applicable to a purchase on margin. If a broker can, for example, on the day after the purchase, demand what he has advanced in the purchase, and sell the stock, if the advancement be not repaid to him, the purpose of the customer is certainly not, in most cases, carried out, since he desires that the stock be carried long enough for him to take advantage of a change in the market value.

In *Markham* v. *Jaudon*,[18] however, it is stated that in the ordi-

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[13](1882) 89 N. Y. 454, 459.

[14]Gillett *v.* Whiting (1890) 120 N. Y. 402; Rogers *v.* Wiley (1892) 131 N. Y. 527, 530 (short sale).

[15]Price *v.* Gover (1874) 40 Md. 102. [16](1884) 95 N. Y. 359, 362.

[17](1874) 54 N. Y. 522. [18]*Supra*, at p. 239.

nary purchase on margin, the broker agrees to carry the stocks (the margin being kept good) "until notice is given by either party that the transaction must be closed"; furthermore, that the customer agrees to take the shares purchased on his order "whenever required by the broker."

In *Stenton* v. *Jerome*,[19] with reference to a purchase on margin, the Court said:

"Under this agreement the defendants were not obligated to carry the stocks indefinitely. Whenever they desired to close the transaction in reference to any stocks, it was their duty to tender the certificates therefor to the plaintiff and demand payment for them; then, if within a reasonable time she did not take and pay for the stocks, they had the right to sell" on notice, etc.

If the two cases last cited state the law correctly, the broker may demand the repayment of his advancement at any time, so that the transaction might be regarded as a call loan if the other necessary elements were present. However, these decisions are in conflict with the reasoning of the short-sale decisions above cited, which seem to be logically correct.

It may be noted also that no demand is necessary in order to make due a *note* payable on demand,[20] while all the cases agree that a *loan* to the customer would not be due until demand had been made for its repayment.[21]

Furthermore, in the usual case of a purchase on margin, no writing exists except, possibly, the order. Interest in excess of six per cent. cannot be collected by the lender unless the parties have agreed in writing to such rate of interest.[22]

The fourth theory, on which the excess of interest is regarded as an authorized expenditure for the customer's benefit, seems to me to present the fewest difficulties, though it is not fully sustained by authorities.

In *Eaton* v. *Alger*[23] it was held that the lender could recover, in addition to the legal rate of interest, his travelling expenses in getting the money. The borrower had expressly agreed to pay

[19](1874) 54 N. Y. 480, 483.

[20]Wheeler *v.* Warner (1871) 47 N. Y. 519; Cottle *v.* Bank (1901) 166 N. Y. 53, 58.

[21]Stenton *v.* Jerome, *supra.*

[22]Hawley *v.* Kountze (1896) 6 App. Div. 217, though even in the absence of writing a loan which has the other elements of a call loan is not usurious.

[23](1864) 2 Abb. App. Dec. 5, 10.

such expenses and it was upon such ground in part that the decision rested. But it was said (as dictum) by the judge who wrote the opinion, as follows:

"Even when the lender, without any special agreement with the borrower, in addition to lawful interest, takes a commission by way of trouble and expense necessarily incurred in and about the business of the loan, the transaction would be supported, provided that such commission was not intended to cover a usurious loan."

The use of the word "commission" in the opinion is rather unhappy, for my purposes, but since the loan in the case was from the same person who procured the money, it is apparent that the charge was not a commission for procuring the loan but rather an expenditure of the lender.

In *Robinson* v. *Norris*[24] it appeared that the brokers, without objection from the customer, had charged him with "Your proportion expenses incurred by us during stringencies on stocks carried for your account."

The charge questioned, however, was not described as an expenditure alone, but as a commission paid by the broker to third persons who procured the money to be loaned to the broker, apparently. It seems to me that it was only necessary to this decision that the broker had made a disbursement authorized by his customer, and that the question whether the broker loaned the money, or whether some third person did so, was immaterial.

It is my contention that usage will take the place of an *express* authorization of *necessary* expenditures, even if the dictum in *Eaton* v. *Alger* (just cited) be not relied upon. If usage is a sufficient authorization, the following cases are a support for this fourth theory.

In *Thurston* v. *Cornell*,[25] the borrower went to the lender and offered to compensate her for her trouble and expense if she would go to get certain money and lend it to him. The question presented was

"whether the lender of money may lawfully receive from the borrower a reasonable compensation, in excess of interest, for services and expenditures in procuring the money to be loaned, provided the services were performed and the expenditures incurred at the request of the borrower, and upon his express promise to pay therefor. Upon this question there can be no doubt. The compensation thus received is distinct from that agreed to be paid for the loan or

[24] (1874) 51 How. Pr. 442, 445. [25] (1868) 38 N. Y. 281.

forbearance of the money. The latter is interest and cannot lawfully exceed seven per cent.; the former is a stipulated price for work, labor and services done and performed, and for money paid, laid out and expended; as such, it constitutes a distinct demand, which might be recovered in a separate action if not included in the security taken for the principal debt."

The judge, in his opinion, cites *Harger* v. *McCullough.*[26] In this case, also, the creditor had made a journey at the request of the debtor, and upon his promise to pay for the trouble and expense. Bronson, J., said:

"There was no usury. It (the sum charged as expenses) was so much money paid, laid out and expended, for the defendant, upon request, and was as much a debt as the original demand. It might have been recovered, had no arrangement in relation to the original debt been made."

The ground of these decisions is the fact that there are two separate transactions: first, the expenditures by the lender necessary in raising the money to make the loan; second, the loan itself. While the language of these cases is, perhaps, not entirely applicable to the case at bar, the reasoning is—if, as I think, the loan from the bank to the broker, and the loan from the broker to the customer are separate transactions.

Thurston v. *Cornell*[27] is cited in *Haughwout* v. *Garrison.*[28] In this case, the creditor agreed to discontinue certain proceedings upon the payment by the debtor of the debt with interest and the expenses incurred. The debtor claimed that the expenses were a part of the consideration for forbearance of money, thus making the agreement usurious. The Court, however, said:

"They had a right to demand indemnity for the expenses incurred by them upon a discontinuance of these proceedings at the request of the debtor, and if the sum demanded was but an indemnity for those expenses, there was no usury."[29]

All the courts of the country do not favor the doctrine of these cases,[30] but such doctrine seems fairly well established in New York. Recovery, however, was refused in *Williams* v. *Hance.*[31] In this case, the ground of refusal was, perhaps, the fact that no necessity for the expense incurred was shown. Furthermore, the item agreed to be allowed as expense was in consideration of the *forbearance* of the principal debt.

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[26](1846) 2 Denio 119. [27]*Supra.* [28](1877) 69 N. Y. 339.

[29]See also Wertheimer *v.* Talcott (1907) 118 App. Div. 840.

[30]Jackson *v.* May (1887) 28 Ill. App. 305.

[31](1839) 7 Paige 581.

Certain restrictions, however, must be borne in mind in urging the fourth theory. Expenses cannot be charged if they are in fact a cover for usury; that is, as stated in *Haughwout* v. *Garrison*,[32] "if the amount claimed and paid was not a part of such expenditures, but was demanded as a cover and device to secure a greater interest than that allowed by law * * *."

The same case, however, further states that

"the affirmative of the issue upon the alleged usury was with the defense, and if the transaction was equivocal, the defendant should have given evidence of facts to show the alleged illegal intent * * *."

If the broker charges a customer only what he paid, can it be said that he has any usurious intent? The language in *Smith* v. *Heath*[33] is instructive on this point:

"The extra rate of interest charged and paid therefor in no way inured to the benefit of the defendants (brokers)."

The broker does not gain by the high rate, if he charges only what he has to pay. According to *Haughwout* v. *Garrison*[34] the burden would seem to be upon the customer to show that the charge was interest, not expenses—the determination of the question being left to the jury.[35]

If the loan is from the broker to the customer, the broker may, of course, charge six per cent. interest, even though he only paid four per cent. for the money. But if he does not in fact pay interest in excess of six per cent., he cannot recover from the client more than the six per cent. So, too, where the broker has paid over six per cent. interest, he cannot recover more than he has paid. There would be no justification for charging to the customer as expenses what the broker had not expended.

If such a charge were made, however, and not agreed to by the customer, it is not certain that a recovery would be refused on the ground of usury. In *Morton* v. *Thurber*,[36] the defendant advanced $67,000 to the plaintiff, charging him with $68,000 and interest on same. The Referee found that the plaintiff had assented to the allowance of the $1,000 difference "under the belief that it was an expense incurred by Thurber (defendant) and on his representation that he had to pay that sum to procure" the money advanced. Thurber had never paid the $1,000 in question. The Court said, per Rapallo, J., at page 556:

[32] *Supra.* [33] *Supra,* at p. 126. [34] *Supra.*
[35] Thurston *v.* Cornell, *supra.* [36] (1881) 85 N. Y. 550.

"There was no agreement between the parties which authorized Thurber to charge the plaintiff with the $1,000 under the circumstances. If he had collected this $1,000 from the plaintiff, suppressing the fact that he had not paid it, it would have been a clear fraud upon the plaintiff, but would not have constituted usury. To constitute usury, it must be shown that the additional interest is paid or retained in pursuance of a mutual agreement between the parties."[37]

The determination that no usury existed rested, apparently, upon the fact that there was no agreement authorizing the defendant to charge as expenses what he had not expended. If, however, the plaintiff had agreed to such a charge (there being no such expenditure), the indication is that the transaction would have been usurious. In such a case, the agreement, instead of abrogating the usury, creates it.[38]

Up to this point, I have assumed that the broker can determine what interest he paid upon the money which he, in turn, loans to the customer, and thus ascertain what amount to charge the customer as expenses on the latter's account. Of course, such expenses are usually not capable of definite ascertainment, since the loans obtained are not specifically applied to any particular customer's account. The broker's method of computation may be distinctive, but the following is, perhaps, a representative method.

The broker averages the daily rates paid by him on all loans after the date of the purchase of the stock. The average rate for the first day may be ten per cent., for the second day twelve per cent., and so forth. At the end of the month the broker averages the daily average and renders an account, charging the customer with the monthly average of interest upon the customer's average monthly debit balance.

It will be seen, then, that the customer may, perhaps, be charged with a higher rate of interest than was actually paid on his loan. On the other hand, the charge may be less. Will not usage justify such rough estimate, if *bona fide,* of the expenses incurred on the customer's account? Will it not, also, supply the authorization necessary to the theory that the extra interest paid is an expense incurred at the customer's request and upon his promise to repay?

The following statement is made in *Harris* v. *Tunbridge*:[39]

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[37]Guggenheimer *v.* Geiszel (1880) 81 N. Y. 293. See also Hagaman *v.* Reinach (1905) 48 Misc. 206.

[38]Cf. Robinson *v.* Norris, *supra;* Hagaman *v.* Reinach, *supra.*

[39](1880) 83 N. Y. 92, 100.

"The drift of the evidence is that there is no general rule or custom for operating in stocks, but each dealer acts on his own judgment."

This language, however, probably expresses more than the court intended, or else the evidence in the case must have been decidedly defective. Usages have been recognized in the stock brokerage business of New York City since 1823, at least—the date of the decision in *Nourse* v. *Prime*.[40] In that case (page 82) the court said, with regard to the right of a broker to hypothecate a customer's stocks:

"Considering the established usage and practice of brokers in similar cases, and the general and known course and extent of business of the defendants, as dealers in stock, there was an implied authority from the plaintiff to the defendants to sell or pledge the stock to raise money to meet their advances in respect to this very plaintiff."

There can be no question that a usage exists among brokers in this city to charge their customers with a part, at least, of the interest paid in excess of six per cent. Does such usage bind the customer?

In *Esterly* v. *Cole*[41] the question was whether plaintiffs, who were merchants, could charge any interest on an account for goods sold and delivered. Bronson, C. J., said:

"An agreement for interest may be inferred from the course of dealings between the parties; as where interest has before been charged and allowed under like circumstances. Also where the creditor has a uniform practice of charging interest, which was known to the customer at the time of the dealing. And where there is a general usage in any particular trade or branch of business to charge and allow interest, parties having knowledge of the usage are presumed to contract in reference to it; and if the usage does not conflict with the terms of the contract, it will be deemed to enter into and constitute a part of it. Knowledge of the usage may be established by presumptive, as well as by direct, evidence. It may be presumed * * * from other facts, as the uniformity, long continuance and notoriety of the usage."

Many of the usages of stock brokers purchasing on margin are so well established, according to some old cases, that parties dealing with them are presumed to know and assent to the usages.

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[40](1823) 7 Johns. Ch. 69, 82. [41]*Supra.*

In *Peckham* v. *Ketchum*[42] the usage in question was the failure of the broker to disclose the principal's name. The Court said:

"The plaintiff dealt with the defendants as stock brokers and was bound by those customs which prevailed in relation to that species of business."

The correct general rule is probably the one set forth in *Harris* v. *Tunbridge*.[43]

"A custom or usage which binds the parties to a contract does so only upon the principle, either that they have knowledge of its existence or that it is so general that they must be supposed to have contracted with reference to it."

It is doubtless true that any customer who has knowledge of the usage under consideration is bound by it, as to transactions where the broker charges no more (above six per cent.) than he has paid. In a case, however, where the customer has been shown to be unfamiliar with Stock Exchange transactions, and therefore has no knowledge, is the usage so general as to be binding? The exact question has never been decided. It would seem, however, that the custom must be sufficiently established, since, as appears by *Robinson* v. *Norris*,[44] the brokers in that case, as early as 1872, wrote their customers that it was their practice, in case of stringent money markets, "to charge them (the customers) in proportion to their debit balances, such expenses as we may have to incur by reason of the stringency."

In *Wicks* v. *Hatch*,[45] it was held that a power of attorney to transact the business necessary to the purchase and sale of stocks "involved the necessity of employing a broker, for the purpose of buying and selling, the pledge of securities purchased, and the right of the broker to protect himself against losses and risks, according to the usual manner and custom in similar cases."

Assuming, then, that the usage under consideration is sufficiently general, the following restrictions should be borne in mind:

First: The custom must not be transgressed by the broker.[46]

Second: It must not be contrary to any rule of law.[47] It cannot, for example, be used to cover usury.

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[42](1859) 5 Bosw. 506. See also Whitehouse *v.* Moore (1861) 13 Abb. Pr. 142.

[43]*Supra.* [44](1874) 51 How. Pr. 442. [45](1875) 62 N. Y. 535.

[46]Newman *v.* Lee (1903) 87 App. Div. 116.

[47]Hopper *v.* Sage (1889) 112 N. Y. 530; Baker *v.* Drake (1876) 66 N. Y. 518.

Third: It cannot be used to contravene the property rights which the law declares that the customer has under the contract.[48] Thus, in the absence of an agreement to the contrary,[49] custom cannot justify the sale by the broker of the stocks purchased by him on margin, unless he has given notice to the customer and complied with the other requirements necessary to authorize such sale.[50]

The usage in question seems to me to fulfill all these requirements. In regard to the method of computing the expenses incurred by the broker on the customer's account, the following case shows the limits at which the broker must stop.

In *Marye* v. *Strouse*,[51] the broker sought to justify, on the ground of custom, a charge for the cost of telegrams. It appeared that, at times, the broker would send a message containing orders for several customers, the total cost being perhaps seventy-five cents or thereabouts and each customer being charged seventy-five cents. "No effort was made to keep an account of the sums actually paid out for telegrams about his business." The Court said:

"A custom or usage like this, of charging customers, in addition to commissions, not merely the actual cost of telegrams, but an arbitrary sum, ordinarily much more than actual cost, if it can be considered reasonable, ought to be established by very satisfactory proof, and it should also appear that both parties had knowledge of it."

The Court says, further (at p. 487):

"It being conceded that the charge is excessive, unless supported by custom, the burden of showing what the real cost of the telegrams was is on the plaintiffs (brokers)."

Since the charge to the customer in the transaction herein supposed is often not excessive, the case last cited does not conflict with the rule in certain decisions above cited[52] that the burden of proving usury is upon the customer.

It should be noted, however, that to justify any charge by the broker against the customer, the broker must have conducted for him some actual transaction. It is not sufficient for the broker

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[48] Markham *v.* Jaudon, *supra;* Douglas *v.* Carpenter (1897) 17 App. Div. 329.

[49] Leiter *v.* Thomas (1905) 110 App. Div. 879.

[50] Sanger *v.* Price (1906) 114 App. Div. 78.

[51] (1880) 5 Fed. 483. [52] Haughwout *v.* Garrison, *supra.*

merely to offset on his books the buying orders of one customer with the selling orders of another.[53]

It might be well to say, in passing, that the practice of rendering monthly accounts to the customer is not usurious, although it may result in the charging of compound interest, *i. e.*, interest upon the interest shown by the account of the previous month. In *Hatch* v. *Douglas*,[54] such a charge was justified on the ground that the customer could pay the interest at the end of the month and thus avoid a compounding of it. The Court, after referring to the usages of New York stock brokers, said (at p. 129):

"Is a contract usurious which is legal on its face, but which is to be performed according to a local custom, when that custom in one contingency calls for compound interest? We think not. The vice is not certain, it is only possible."

While this is not a New York decision, the reasoning seems to be within the well settled principle stated in *Sumner* v. *The People*:[55]

"If the payment is conditional, and that condition is within the power of the debtor to perform, so that the creditor may by his debtor's act be deprived of any extra payment, it would not be usurious."

If the customer who objects to the charging against him of the interest paid is one to whom like charges have been made in the past without dispute, is not such customer estopped from objecting?

In *Robinson* v. *Norris*,[56] the Court said, by Van Brunt, J. (p. 448):

"It seems to me that the defendant was in duty bound, if he intended to dispute these charges, to notify the plaintiffs at once, as soon as he was made aware of the fact, and not let them make day by day these expenditures for his benefit, and not wait until he is called upon to pay to dispute them. If he did not desire them to raise money to carry his stocks at such high rates, he should have said so, and then the plaintiffs could have protected themselves."

This language, it seems to me, is directly applicable to cases where charges similar to the one objected to have been made in the past without objection.[57]

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[53] Haight *v.* Haight & Freese Co. (1906) 112 App. Div. 475.

[54] (1880) 48 Conn. 116.

[55] (1864) 29 N. Y. 337, 340. See also Hart *v.* Dewey (1830) 2 Paige 207.

[56] *Supra.* [57] See, however, Narden *v.* Duke (1908) 120 App. Div. 1.

Even if the charge disputed is the first one which has ever been made to the customer, it is perhaps possible for him to waive his right to object, by not objecting promptly. In *Knickerbocker* v. *Gould*,[58] the Court said:

"The defendant was a witness upon the trial and he did not deny that he received the account; and he retained it without making any objection, although the letter in which it was enclosed fairly challenged him to dispute it if inaccurate. He must, therefore, be deemed to have assented to its accuracy, and the plaintiffs, therefore, rightly contend that it became a stated account."

In *Stenton* v. *Jerome*,[59] the Court, in connection with a broker's account rendered, described an account stated and then said:

"If one party presents his account to the other and the latter makes no (seasonable) objection, it may well be inferred that he is satisfied with and assents to it as correct. If an account be made up and transmitted by one party to the other by mail, and the latter keeps it for some considerable time without making any objection, he is held to have acquiesced in it.

But, according to *Eames Co.* v. *Prosser*,[60] there must be proof in some form of an express or implied assent to the account rendered by one party to another before the latter can be held to be so far concluded that he can impeach it only for fraud or mistake."[61]

In conclusion, it may again be noted that, since the use of the money inures primarily to the benefit of the customer, it is but just that the customer should pay what is charged for its use. The equities of the case are, therefore, with the broker, *if he charges only what he paid.*

HAROLD C. MCCOLLOM.

NEW YORK.

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[58] (1889) 115 N. Y. 533, 537. [59] *Supra.*

[60] (1898) 157 N. Y. 289.

[61] See also Buch *v.* Houtaling (1905) 110 App. Div. 52; but note Burham *v.* Lockwood (1902) 71 App. Div. 301.

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NOTES.

"SOLE BENEFIT" IN DIRECTIONS FOR ACCUMULATIONS UNDER NEW YORK STATUTES.—Under New York statutes all directions for the accumulation of the rents and profits of land or the income of personal property are void unless such accumulation is directed to commence within the time limited for the suspension of the power of alienation or absolute ownership, is for the benefit of one or more minors then in being, and is to terminate at or before the expiration of their minority. 1 R. S. 726, §§ 37, 38; id. 773, § 3; see also Laws 1896, c. 547, § 51; Laws 1897, c. 417, § 4. A recent case, *Cochrane* v. *Alexandre* (1907) 107 N. Y. Supp. 587, has confirmed the rule laid down by *Pray* v. *Hegeman*, (1883) 92 N. Y. 508, that the accumulation directed must be for the sole benefit of the infant beneficiary, and that therefore a direction that the income only from the accumulated fund be paid to the infant after his majority and that at his death after majority the fund

shall go to another is void. See 7 COLUMBIA LAW REVIEW 403. The rule requires that the minor shall take the accumulations in enjoyment upon attaining his majority, *Pray* v. *Hegeman, supra*, 516, but its effect upon a direction to accumulate for a minor, A, and to pay over the accumulated fund to him upon majority, but if he die during minority, then to pay over that fund to another, B, has not as yet been definitely settled. The Court of Appeals has dealt directly with the question only in a solitary dictum, *Smith* v. *Parsons* (1895) 146 N. Y. 116, 120, although in *Wood* v. *Mitcham*, (1883) 92 N. Y. 375, where the question was not raised or noticed by the court, the result of the decision was to hold such a direction over valid. In the aforesaid dictum the Court said that there was no legal objection to such a direction over to either a minor or an adult, provided the accumulations had not vested in A as paid in. The question then arises as to whether accumulations must vest as they accrue in order that a direction to accumulate may be valid. It is settled that A must be entitled to the next eventual estate in the realty, *Manice* v. *Manice* (1871) 43 N. Y. 303; *Pray* v. *Hegeman, supra;* Revisers' Notes, 3 R. S. 578 (2nd Ed.); and see Laws 1896, c. 547, § 52, and that this estate must be vested in him in order that the accumulation may be said to be for his benefit. *Manice* v. *Manice, supra*, 379, 380. Ordinarily the deed or will vests the estate, and the interposition of the minority is not a condition precedent. *Manice* v. *Manice, supra*, 380. The same rules appear now to apply to the corpus of personalty and with equal reason. 7 COLUMBIA LAW REVIEW 73; *Everitt* v. *Everitt* (1864) 29 N. Y. 39; *Paterson* v. *Ellis* (1833) 11 Wend. 259; but see Laws 1897, c. 417, § 5, where the words "entitled to the expectant estate" are omitted. If, then, the expectant estate must vest in the minor in order that the accumulations may be said to be for his benefit, it would seem *a fortiori* that the accumulations should vest as they accrue. In *Manice* v. *Manice, supra*, 379, 380, it was laid down that accumulations must be for the sole benefit of the minor; that, therefore, the accumulations must vest; but that they could not vest if the expectant estate in the realty was contingent; and that, therefore, the estate in the realty must be vested. In this argument the court assumed as a premise that the accumulations must vest, and such seems to be the law. *Draper* v. *Palmer* (1889) 27 N. Y. St. Rep. 510; *Smith* v. *Parsons, supra*, 121; *Smith* v. *Campbell* (1894) 75 Hun 155, 161; *Willets* v. *Titus* (1878) 14 Hun 554; *Gilman* v. *Healy* (1882) 1 Dem. 404, 408; and see *Matter of Lehman* (1896) 2 App. Div. 531; and Laws 1896, c. 547, § 52; Laws 1897, c. 417, § 5, which assume vesting. Revisers' Notes, 3 R. S. 578 (2nd Ed.).

According to the dictum then, in *Smith* v. *Parsons, supra*, a direction over to B would be invalid, but the lower courts, in several instances, have intimated that vested accumulations might be divested upon the death of A during his minority. *Willets* v. *Titus, supra; Gillman* v. *Healy, supra*, 408; and see *Bolton* v. *Jacks* (1868) 6 Robt. 166, 230. In the case last cited the Court reasoned that by the act of God it was impossible to comply with the provisions of the statute by giving the accumulations to the minor at majority, and that therefore, if there were no provision in the will, the fund would have to revert back and the testator die intestate as to it; hence that there was no reason why the testator should not anticipate this result,

treat the fund as part of his original estate, and devise it over to whom he chose. But this, of course, assumes that the accumulations did not vest as they accrued. It has also been stated that a devise over of the corpus, if the minor dies before majority, carries with it the accumulations, *Gilman* v. *Healy, supra,* 408, but this is repudiated by *Draper* v. *Palmer, supra.* In *Smith* v. *Campbell, supra,* 158, 159; cf. *Smith* v. *Parsons, supra,* 120, it was stated that a gift over to B, an adult, would be void under the statute, but that a gift over to B, a minor, might not be. There should be no distinction between these two cases, for since A takes a vested interest in the accumulations, B, in either case, takes only a contingent interest, and the accumulation is not for his sole benefit. A distinction, however, must be made between the question whether a direction under the statute is good or bad, and the question whether the statute operates upon a given direction at all. The statute operates upon "all directions for the accumulation * * * for the benefit of one or more persons." Thus, if there is a direction to accumulate for A and pay the accumulated fund to him at his majority provided he is unmarried, the statute operates upon it although the gift is contingent, and the result is that the direction is void, for although the accumulation is for A's benefit, it is not for his sole benefit. See *Pray* v. *Hegeman, supra,* 514. So in the case of a direction over to B the accumulation is equally for his benefit, and the statute operates upon it, whether B is a minor or an adult, and makes the direction bad. It seems, therefore, that every direction over is void under the statute. See *Smith* v. *Parsons, supra,* and *Draper* v. *Palmer, supra.* Chaplin, Susp. Pow. Alien. § 263 *et seq.* But cf. Reeves, Real Prop. § 677, where a direction over is supported on the ground of the practical necessity of the case.

The remaining question then, is whether, by reason of the void direction over, the primary direction to accumulate for A is avoided. This depends upon the meaning of the words "sole benefit." If they mean the total possible legal benefit, it is evident that the primary direction would likewise be void, for the direction over involved a legal benefit to the contingent remainderman sufficient to make the statute operate upon it, thus subtracting from A's necessary total possible legal benefit. However, it would seem that the requirement of the words "sole benefit" and the apparent and reasonable meaning of the statute are satisfied if A has a vested interest both in the expectant estate and in the accumulations as they accrue, to become absolute in enjoyment in him upon his attaining his majority, *Manice* v. *Manice, supra; Pray* v. *Hegeman, supra,* and that the mere addition of a void condition subsequent should be insufficient to invalidate an otherwise valid primary direction. It is doubtful if any court would adopt the opposite construction. The clear object of the statute is to protect and benefit a living infant; the court likewise will strive to protect him, and hence to uphold the primary direction. Conceivably courts may continue to ignore the operation of the statute upon the direction over, *Willets* v. *Titus, supra; Bolton* v. *Jacks, supra; Gilman* v. *Healy, supra; Smith* v. *Campbell, supra,* on the ground that the object of the statute has been satisfied, or on the ground of the practical necessity of the case. However, if this be so, it is difficult to see how the statute could operate at all upon a primary direction giving a mere contingent interest to an infant, and yet the court in *Manice*

v. *Manice, supra,* expressly stated that such a direction would be invalid under the statute. See *Smith* v. *Parsons, supra,* 120. Unless both directions are held valid, it is submitted that the practical results of the view advanced here are the better, for if the other view be taken, i. e. that "sole benefit" means total possible legal benefit, both directions are invalidated, thus defeating the apparent object of the statute, the policy of the court as to infants, and the intent of the testator, for the infant will take the accumulations as they accrue, since he is the person presumptively entitled to the next eventual estate. 38 N. Y. Law Jour. No. 132; 7 COLUMBIA LAW REVIEW 403.

LIBERTY OF CONTRACT AND THE COMMERCE CLAUSE.—Section 10 of the Erdmann Act, passed in 1898 in the hope of preventing railway strikes, and providing for voluntary arbitration of labor disputes between interstate carriers and their employees, made it a misdemeanor for an interstate carrier or its agent to dismiss an employee because of his membership in a labor union. This section has recently been held unconstitutional by the Supreme Court, two Justices dissenting. *Adair* v. *United States* (Jan. 27, 1908). Two grounds were given for the decision: (1) The Act deprived the plaintiff, an agent of a railway company, of the liberty guaranteed him by Amendment V, U. S. Const.; (2) The subject of the section bore no such relation to interstate commerce as to warrant Congressional regulation. The second ground indicates a slight narrowing of the court's interpretation of the commerce clause. Congress has power over the persons engaged in interstate commerce in so far as its action constitutes a regulation of that commerce; *Cooley* v. *Board of Wardens* (U. S. 1851) 12 How. 299, 316; 7 COLUMBIA LAW REVIEW 116; although it may not interfere with their general business affairs. *Employers' Liability Act Cases* (1908) 207 U. S. 463, 502; *Interstate Commerce Commission* v. *Harriman* (1908) 157 Fed. 432. But, although Congress possesses a large discretion as to the means of executing its power, *Lottery Case* (1902) 188 U. S. 321, 355, the professed regulation must always bear a substantial relation to interstate commerce. *United States* v. *E. C. Knight Co.* (1894) 156 U. S. 1; *Hopkins* v. *United States* (1898) 171 U. S. 578; 7 COLUMBIA LAW REVIEW 116. In the principal case the connection between interstate commerce and the employee's membership in a labor union seems distinctly more remote than was the case even in the *Employers' Liability Act* decision. Had the regulation tended to increase the efficiency of the service, as by prescribing actual qualifications for employees, it would probably have been sustained; *Smith* v. *Alabama* (1888) 124 U. S. 465, 479; *Nashville etc. Ry.* v. *Alabama* (1888) 128 U. S. 96, 99; and the minority argued that the purpose of the Act indicated its beneficial nature beyond the reach of judicial determination. But a court may not decline to investigate the real character of a statute because of its nominal purpose and the confidence of its framers. *Lochner* v. *New York* (1904) 198 U. S. 45, 64. And here it was forced to conclude that the Act was not in fact a regulation of interstate commerce.

The other ground for the decision involves an interpretation of two apparently conflicting clauses in the Constitution. Although similar statutes passed by State legislatures have rarely been sustained, *People* v. *Marcus*

(1906) 185 N. Y. 257; *Gillespie* v. *People* (1900) 188 Ill. 176, this is believed to be the first time that an Act of Congress has been declared void as an invasion of the right of freedom of contract. The intimation of the court, that this right limits the power of Congress over interstate commerce, finds support in a previous dictum. *United States* v. *E. C. Knight Co., supra,* 39 (dissenting opinion); contra, *Addyston Pipe & Steel Co.* v. *United States* (1899) 175 U. S. 211 (dictum). Since the national government is one of enumerated powers the Bill of Rights must limit those enumerated powers, or it is unnecessary. The commerce clause has concededly some limitations in the Constitution. *Gibbons* v. *Ogden* (1824) 9 Wheat. 1, 196; *Lottery Case, supra,* 353. One of these is Amendment V. *Monongahela Navigation Co.* v. *United States* (1892) 148 U. S. 312, 336; *Interstate Commerce Commission* v. *Brimson* (1893) 154 U. S. 447, 479. Amendments I and IV are paramount to a similar grant of power, the post roads clause. *Ex parte Jackson* (1877) 17 Wall. 727. Under the guise of the commerce clause a man cannot be forced to incriminate himself; *Counselman* v. *Hitchcock* (1891) 142 U. S. 547; *Interstate Commerce Commission* v. *Brimson, supra;* nor may his property be taken for public use without just compensation; *Monongahela Navigation Co.* v. *United States, supra;* nor, it seems, may he be deprived of it. See *United States* v. *Adair* (1907) 152 Fed. 737, 755. It would appear, therefore, that the personal rights of the individual should receive the same protection.

The word liberty in the 5th and 14th Amendments has been very broadly construed by our Courts. *Allgeyer* v. *Louisiana* (1896) 165 U. S. 578. How far this was warranted by the traditional rights of Englishmen as defined by Magna Charta, see 4 H. L. R. 365, and how far determined by the political ideals of the Revolution, Prentice, Fed. Power over Carriers and Corp., p. 25, is of historical interest only. But the right secured by the amendments has never been held to include the freedom to make absolutely all contracts. *Lochner* v. *New York, supra; United States* v. *Joint Traffic Ass'n* (1898) 171 U. S. 505; see *Aikens* v. *Wisconsin* (1904) 195 U. S. 194. The States may abrogate it in the exercise of their police powers. *Lochner* v. *New York, supra.* Likewise, Congress may make police regulations with regard to those matters expressly entrusted to its care, even though incidentally it abrogate freedom of contract. *Lottery Case, supra,* 357; *In re Debs* (1894) 158 U. S. 564, 579; *Patterson* v. *Bark Eudora* (1903) 190 U. S. 169. It is obviously impossible to determine exactly what is meant by the right to make all lawful contracts. Yet negatively it may be said that no one has a constitutional right to make contracts which are opposed to a definite public policy. None such are protected by the Bill of Rights. This principle explains several cases in which the plea of liberty of contract was unsuccessfully invoked. In *United States* v. *Joint Traffic Ass'n, supra,* where it was held that the Sherman Act, previously declared constitutional, *United States* v. *Trans-Missouri Freight Ass'n* (1897) 166 U. S. 290, prohibited an agreement between railway companies to maintain agreed rates, the court, while adopting the broad construction of the Act laid down in the *Trans-Missouri* case, intimated that, though the rates themselves were reasonable, the combination was an unreasonable restraint of trade, destroying competition, and therefore undeserving of protection under the 5th

Amendment. The dependence of the citizen's personal rights upon the established economic policy of the nation was emphasized in *Northern Securities Co.* v. *United States* (1904) 193 U. S. 197 by Harlan, J. "The constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in interstate and international commerce." Brewer, J., however, found as a fact an unreasonable restraint of trade. In the principal case no such criticism of the plaintiff's conduct was possible. *Boyer* v. *W. U. Tel. Co.* (1903) 124 Fed. 246. In the *Employers' Liability Act Cases, supra,* the court declined to discuss the point. In general, moreover, liberty of contract does not prevent legislatures from establishing the ordinary rules of liability, and from that standpoint the only question was whether Congress had jurisdiction over the subject of the Act, the relation of master and servant. Cf. ibid., 537.

In the principal case the plaintiff was a natural person. But since a corporation is a person within the meaning of the 4th, *Hale* v. *Henkel* (1905) 201 U. S. 43, 76; 6 COLUMBIA LAW REVIEW 343, and 14th Amendment, *Gulf, etc. Ry. Co.* v. *Ellis* (1897) 165 U. S. 150, and two other clauses of the 5th Amendment, *Monongahela Navigation Co.* v. *United States, supra; United States* v. *Joint Traffic Ass'n, supra,* semble, it would seem that it possesses a constitutional right to enter freely into contracts appropriate to its situation. Even in the case of public servants this should include the selection and retention of employees.

THE PRESENT STATUS OF THE TRUST FUND DOCTRINE.—By virtue of the original trust fund doctrine, a corporation holds its property in trust for the payment of its debts, and stockholders are not entitled to any share of the capital stock until those debts are paid. *R. R. Co.* v. *Howard* (1868) 7 Wall. 392. The doctrine at first applied only to the tangible property which composed the capital. *Wood* v. *Dummer* (Fed. 1824) 3 Mason 308. Its supposed strength lay in preserving the fund intact, by giving creditors a lien in equity upon the fund against all but *bona fide* holders. *Sanger* v. *Upton* (1875) 91 U. S. 56. That it had any such effect while the corporation was solvent, is doubtful. In *Wood* v. *Dummer, supra,* the distribution was pursuant to dissolution; in *Curran* v. *Arkansas* (U. S. 1853) 15 How. 304, after insolvency. The question whether the holders of assets distributed without consideration during solvency, could be held liable after insolvency, when the distribution was not likely to, and did not, cause insolvency, was not presented. Any other result, however, would be incompatible with the doctrine as stated. Yet in *McDonald* v. *Receiver* (1899) 174 U. S. 397, a dividend paid out of the assets of a solvent bank, was held not recoverable after insolvency. Cf. *Lawrence* v. *Greenup* (1899) 97 Fed. 907. If a solvent corporation has "dominion over its assets," *Graham* v. *R. R. Co.* (1880) 102 U. S. 148, to this extent, the trust fund doctrine, if limited to its original scope, would be needless.

But the doctrine was extended to unpaid subscriptions to the capital stock, *Sawyer* v. *Hoag* (1873) 17 Wall. 610, including them within the fund, perhaps because they are a part of the capital stock. If so, this extension, it seems, should fall with the original. If stock subscriptions may be paid

in and then distributed in part as dividends, *McDonald* v. *Receiver, supra,* it follows logically that unpaid subscriptions (which are also assets) might be distributed (i. e. released) if the corporation is solvent. But such unpaid subscriptions can be released at no time to the prejudice of creditors. *Sawyer* v. *Hoag, supra.* It would seem, then, that subscriptions are a trust fund while remaining unpaid, but when paid they cease to be so; the corporation holds only the claim in trust. But the cases of *Upton* v. *Triblicock* (1875) 91 U. S. 45 and *Sanger* v. *Upton, supra,* negative such a distinction. Even excluding those cases, this solution is averted by *Graham* v. *R. R. Co., supra; Hollins* v. *Iron Co.* (1893) 150 U. S. 371, and especially *McDonald* v. *Receiver, supra,* which declare that insolvency is a condition precedent to the creation of the trust. The trust does not arise *eo instanti* by the mere fact of insolvency, cf. *McDonald* v. *Receiver, supra,* but more is needed. *Hollins* v. *Iron Co., supra.* "A court of equity, at the instance of the proper parties, will then [after insolvency] make those funds trust funds." *Graham* v. *R. R. Co., supra.* No other view would be consistent with the right of an insolvent corporation to prefer creditors. *Gould* v. *Little Rock etc. R. R. Co.* (1892) 52 Fed. 680; *Smith etc. Co.* v. *McGroarty* (1890) 136 U. S. 237. Although a corporation is insolvent at the time that a stockholder pays his unpaid subscription, no trust attaches to that money, until a court of equity interposes. The money might be used to pay the company's debts, even one owing to the same stockholder. This transaction is identical with releasing the subscription and allowing the debt to be set off. But the trust fund doctrine prevents the latter arrangement. *Sawyer* v. *Hoag, supra.* As to part of the assets, then,—namely, the unpaid subscriptions,—insolvency alone creates the trust. The distinction seems arbitrary.

If a contract releasing the stockholders from unpaid subscriptions is set aside, equity can then enforce the original contract to pay par. If the original contract were to pay less than par, equity might impose this liability on the ground of equitable estoppel, if the creditor has a right to infer that the contract is to pay par. Or equity may set aside the old and make a new bargain for the parties. Such was the case of *Hawley* v. *Upton* (1880) 102 U. S. 314, on the theory that the company had no right to sell its stock for less than par. But if the contract is illegal, it should fall *in toto, In re Wedgwood etc. Co.* (1877) L. R. 7 Ch. Div. 75, 94, and not be made valid by raising the consideration. However, the doctrine of the *Upton* case is at least simple. But in *Handley* v. *Stutz* (1891) 139 U. S. 417, a perplexing modification is introduced. In that case a going concern issued bonds, with a bonus of stock of a new issue; after insolvency, the bondholders were held not liable for the par value of the stock, the court saying that it could be disposed of, for certain purposes, for "the best price that can be obtained." If sold for less, the contract implied by equity would probably be to pay the difference between the sale price and this "best price" by analogy to the previous holdings. How shall the latter price be determined? If the new shares are sold for cash it is difficult; doubly difficult, when the entire new issue is distributed with bonds for a lump sum, to determine the proportionate value of each. The market value of the old stock would hardly be a fair criterion, until at least, it is determined how far the new issue impairs that value. If the original stock of the corpora-

tion in *Handley* v. *Stutz, supra,* had been only half subscribed for, the corporation, while still a going concern as in that case, instead of issuing new stock, might have disposed of this remaining portion of original stock. In such a case, the "best price" should be the limit of the buyer's liability. It would hardly seem that the latter should be held for the par value, simply because the stock was part of the original issue.

The trust fund theory then, as to unpaid subscriptions, has little potency. In later decisions however, the Supreme Court states it, not as a doctrine to preserve the assets, but as a principle of administering the assets of an insolvent corporation when a court of equity has taken possession upon some wholly independent principle of equity jurisprudence. *Hollins* v. *Iron Co. supra; O'Bear etc. Co.* v. *Volfer* (1894) 106 Ala. 205, 226. There is in no sense a trust, so as to give a simple contract creditor any lien on the property, as was asserted in a recent case. *Swartley* v. *Oak Leaf etc. Co.* (Ia. 1907) 113 N. W. 496. It is after jurisdiction attaches, that the efficiency of the trust fund doctrine is found, and the assets are distributed *pari passu,* a result unlike the usual creditor's suit, for there the complainant would be preferred by the decree of the court, except where the assets are in the hands of a true trustee. *Iauch* v. *Socarras* (1898) 56 N. J. Eq. 524, 527.

Provability of Contingent Claims in Bankruptcy and Bankruptcy as an Anticipatory Breach.—The bankruptcy statutes of 1841 and 1867 contained provisions for the proof of contingent claims, the latter statute allowing the creditor either to prove with the right to share in the dividends if the liability became fixed before final distribution, or to prove for the present value of the claim; the former statute allowing the first method with no limitation as to the time of fixing the liability, and the second method in certain specified cases. Earlier cases, holding all contingent claims provable, because of the presumed policy of the statute to discharge all claims, *Jameson* v. *Blowers* (N. Y. 1849) 5 Barb. 686; *Shelton* v. *Pease* (1847) 10 Mo. 474; *Reitz* v. *People* (1847) 72 Ill. 435, were limited by the rule later adopted that the claim was provable if the cause of action was contingent but not provable if the existence of the demand was contingent. *Riggin* v. *Magwire* (1872) 15 Wall. 549; *French* v. *Morse* (Mass. 1854) 2 Gray 111. This rule, seemingly referable only to the first method of proof, was an inexact way of saying that a contingent claim was not provable, if the extent of the liability as well as the cause of action was contingent, as in the case of a covenant of incumbrances, *Riggin* v. *Magwire, supra,* but was provable where the value of the claim, when the contingency happened, was estimable, as in the case of a bond for a fixed amount conditioned on a contingency. *Wolf* v. *Dix* (1878) 90 U. S. 1. Where the creditor proved for present payment under the second method, the present value of the claim must have been capable of estimation. See Blumensteil, Bankruptcy, 271, 275.

The present statute (1898) makes no express provision for the proof of contingent claims. The right given a surety of the bankrupt's creditor to prove by subrogation to the latter's right, § 57i, gives him an absolute not a contingent claim. § 63b, providing for the liquidation of claims, is held not to enlarge the class of claims provable under § 63a. *Dunbar* v. *Dunbar* (1902) 190 U. S. 304. § 63a provides "that debts of the bankrupt may be

proved which are (1) a fixed liability absolutely owing at the time of the filing of the petition whether then payable or not" and "(4) founded upon * * * a contract express or implied." It is generally held that contingent claims are not provable under a(1) since they are not absolutely owing. *In re Gerson* (1901) 105 Fed. 891; *In re Pettingill & Co.* (1905) 137 Fed. 143; but see *Cobb* v. *Overman* (1901) 109 Fed. 65. The omission of the words "absolutely owing" in a(4) seems to allow the proof of contingent debts based on contract. Thus it is held that the obligation of an indorser may be proved if the contingency, i. e., note's dishonor and notice, occur before the time for proving claims has expired. *In re Gerson, supra; In re Phillips Semmer Glass Co.* (1905) 135 Fed. 77. But the doctrine expressed in *In re Pettingill, supra,* that the provability of a claim depends upon its status at the time of the filing of the petition seems opposed to the result reached in the indorser cases. The general policy of the statute which makes the time of the filing of the petition of determinative importance, does not permit the proving of debts which had no existence at that time and to this extent the omission in a(4) of the limiting words contained in a(1) must be supplied. *In re Burka* (Fed. 1900) 5 Am. B. R. 12; *In re Adams* (Fed. 1904) 12 Am. B. R. 368. But in the indorser cases there is an existing debt, as debt is liberally defined by the statute, although owed contingently. Therefore to exclude the indorser's liability, the word "absolutely" as well as the words "owing" etc. must be inserted in a(4), an insertion which the policy of the statute does not demand and which by excluding the proof of all contingent claims will bring about an undesirable result.

A simple contract liability is not provable since there must be a demand founded thereon, see Collier, Bankruptcy (6th Ed.) 514, but this demand arises when the contract is broken. *In re Sterns* (1902) 116 Fed. 604. Furthermore it has been held that bankruptcy is a repudiation of a contract constituting an anticipatory breach, *In re Swift* (1901) 112 Fed. 315; *In re Pettingill, supra; In re Stern, supra,* and although this theory has been limited to contracts the performance of which is obligatory before date of the adjudication, *In re Imperial Brewing Co.* (1906) 143 Fed. 579, in most cases such a limitation is not observed, since the more reasonable view is to regard bankruptcy as a repudiation of all existing obligations. Thus generally in jurisdictions where the doctrine of anticipatory breach is law, see Page, 3 Contracts 2220; *Roehm* v. *Horst* (1900) 178 U. S. 1, provable claims would arise on the contracts of a bankrupt, subject to the limitation that the doctrine does not apply to contracts for the payment of money where one side has been executed, see 6 COLUMBIA LAW REVIEW 589, and to the limitation that the trustee may elect to carry out the contract. See *In re Pettingill, supra.* It would seem that contingent claims resting on contracts thus repudiated might be proved either, by analogy to the indorser cases, if the contingency happens before the time for proving has expired, thus assimilating the practice under the old statute, see Collier, Bankruptcy (6th Ed.) 514; but see *In re Pettingill, supra,* or when the extent of the contingent liability can be fairly calculated. See *Dunbar* v. *Dunbar, supra.* But where the contingency has not happened and the claim cannot be estimated there is no provision for conditional proof as under the former

statute. See *supra*. The decision in *Dunbar* v. *Dunbar, supra*, that a claim on a life annuity, conditioned on the annuitant remaining unmarried, was too contingent for proof, indicates that a contingent claim capable of estimation could be proved.

In a recent case the court overruled the defendant's plea of a discharge in bankruptcy in an action on a contract to purchase stock on or before a certain day. *Phenix Nat'l Bank* v. *Waterbury* (1908) 38 N. Y. Law Jour. 110. The contract did not create a debt since there could be nothing owing until the stock was tendered. See *Ames* v. *Moir* (1891) 138 U. S. 306. Nor did a debt arise on the contract because of bankruptcy since, conceding that the bankruptcy might be an anticipatory breach it is not so considered unless the party elects to recognize it as such. *Roehm* v. *Horst, supra*. It follows that since the party did not attempt to prove his claim, he did not make his claim provable and therefore was not barred in the subsequent action. The logic of this application of the doctrine of anticipatory breach to bankruptcy cannot be questioned, but it would not be surprising if the courts ultimately refused a creditor the option given him in the principal case.

Chattel Mortgages of After Acquired Property.—Since "a man cannot grant or charge that which he hath not," Perk., 65, a chattel mortgage, operating as a present sale subject to a condition subsequent, is ineffectual in general to pass title to after acquired property, *Lunn* v. *Thornton* (1845) 1 C. B. 379; *Jones* v. *Richardson* (1845) 10 Met. 481; but see *American Cigar Co.* v. *Foster* (1877) 36 Mich. 368, subject to the exception that if the property has a potential existence, title passes, *Grantham* v. *Hawley* (1615) Hob. 132, a distinction the artificiality of which is illustrated by the irreconcilable diversity of the decisions in its application. Cf. *Briggs* v. *U. S.* (1891) 143 U. S. 346; *Rochester Distilling Co.* v. *Rasey* (1894) 142 N. Y. 570; *Comstock* v. *Scales* (1859) 7 Wis. 159; *Van Hoozer* v. *Cory* (1860) 34 Barb. 9. Any new act, however, when the property is acquired, sufficient to transfer title, brings it within the operation of the mortgage, Bacon, Max. R. 14, subject to the intervening rights of third parties; *Spinney* v. *Meloon* (N. H. 1907) 68 Atl. 410; thus, delivery by the mortgagor, *Stern* v. *Simpson* (1878) 62 Ala. 194, indorsement upon the mortgage, *Brown* v. *Thompson* (1871) 59 Me. 372, and, it would seem, the mere act of bringing the property upon the mortgagor's premises, if agreed to, see *Reeves* v. *Barlow* (1884) L. R. 12 Q. B. D. 436, though this result is hardly reconcilable with the broad statements in the earlier cases. Benj., Sales (5th Ed.) 129. So, also, if the mortgagee takes possession with the consent of the mortgagor, *Peabody* v. *Landon* (1888) 61 Vt. 318, or under a power to seize for that purpose, *Congreve* v. *Evetts* (1855) 10 Ex. 297; *Chase* v. *Denny* (1881) 130 Mass. 566, which power, coupled with an interest, *semble*, *Wood* v. *Leadbitter* (1845) 13 M. & W. 837, 846, would be irrevocable, see *McCaffrey* v. *Woodin* (1875) 65 N. Y. 459; contra, *Chynoweth* v. *Tenney* (1860) 10 Wis. 397, save by a discharge of the principal debt as in bankruptcy. *Thomson* v. *Cohen* (1872) L. R. 7 Q. B. 527. Seizure under the insecurity clause, *Francisco* v. *Ryan* (1896) 54 Oh. St. 307, or under the foreclosure clause, *Bennett* v. *Bailey* (1889) 150 Mass. 257; *Keating* v. *Han-*

nenkamp (1889) 100 Mo. 161, is also held sufficient. If the mortgagor of a stock of goods is empowered to sell but required to invest the proceeds in new stock, it is sometimes held by a fiction of agency that goods purchased with the proceeds of sales become the property of the mortgagee. *Allen* v. *Goodnow* (1880) 71 Me. 420. This doctrine has few adherents.

Various explanations have been given of the equitable jurisdiction of mortgages of after acquired property. Lord Westbury, making no distinction between a mortgage and an absolute sale, declared it an application of the doctrine of specific performance of a contract to sell, *Holroyd* v. *Marshall* (1861) 10 H. L. C. 191, but since equity will not enforce a contract to sell personalty not unique, this view is open to criticism. Pom. Eq. Juris. § 1288 n. 4. The maxim that equity regards as done that which ought to be done is considered by Lord MacNaghten the true explanation in a later English case, *Tailby* v. *The Official Receiver* (1888) 13 App. Cas. 523. but this is an explanation of the operation of equity, not of the primary consideration which gives rise to equitable interference. Pomeroy's *rationale,* that equity steps in to transfer a possibility not transferable at law, Pom., *supra,* § 1288, is given color by several early cases, *Wright* v. *Wright* (1750) 1 Ves. 409, but finds no support in the later cases. Any one of these theories applies equally well to every absolute sale, and though this result is favored by numerous dicta and a few isolated cases, *Brown* v. *Bateman* (1867) L. R. 2 C. P. 272; *McDonald* v. *McDonald* (N. C. 1859) 5 Jones Eq. 211, it seems inconsistent to enforce a sale of after acquired personalty and to refuse enforcement of an executory sale of specific property already owned. From this standpoint, Prof. Williston's view that the mortgage is specifically enforced on account of its uniqueness, security against insolvency, is plausible, though historically inaccurate. Whatever be the true explanation, it is well settled that an equitable lien attaches to the property when acquired, *Holroyd* v. *Marshall, supra; Pennock* v. *Coe* (U. S. 1859) 23 How. 117; *Smithhurst* v. *Edmunds* (1862) 14 N. J. Eq. 408; contra, *Moody* v. *Wright* (Mass. 1847) 13 Met. 17. following a dictum of Parke, B., in *Mogg* v. *Baker* (1838) 3 M. & W. 194; *Chynoweth* v. *Tenny, supra,* which is enforcible against all third parties but a purchaser for value without notice. *Mitchell* v. *Winslow* (Fed. 1843) 2 Story 630; *Ludlum* v. *Rothschild* (1889) 41 Minn. 218; contra, *Rochester Distilling Co.* v. *Rasey, supra,* and *Zartman* v. *First Nat'l Bk.* (N. Y. 1907) 82 N. E. 127, giving a lien against the mortgagor only.

The application of the foregoing principles is frequently limited by other considerations. If the mortgagor of a stock of goods is empowered to sell, a majority of States, 6 Cyc. 1104-1120. following the New York rule, *Edgell* v. *Hart* (1853) 9 N. Y. 213. established during the controversy over Twyne's Case, *Diver* v. *McLaughlin* (1829) 2 Wend. 596, on the strength of an early English *nisi prius* decision, *Paget* v. *Perchard* (1794) 1 Esp. 205, consider the mortgage void against creditors for fraud, with the subsequent modification that if the profits are to be applied to the mortgage debt the presumption of fraud may be rebutted by evidence of good faith. *Brackett* v. *Harvey* (1883) 91 N. Y. 214; *Edelhoff* v. *Horner etc. Mfg. Co.* (1897) 86 Md. 595; contra, *Deering* v. *Washbourne* (1891) 141 Ill. 153. England and some states hold fraud a question of fact in all cases. *Ex parte Games*

(1879) 12 Ch. Div. 314; *Fletcher* v. *Powers* (1881) 131 Mass. 333; 6 Cyc., *supra*. The two doctrines are ultimately based upon diverse views of public policy. The usual argument for the New York doctrine that the arrangement induces a false credit, is equally applicable if the profits are to be applied to the mortgage debt, and loses force where recording gives notice. The objection that a mortgagor is authorized to sell out in defraud of creditors, exists only where there is no obligation to maintain the stock. Delay of general creditors follows any mortgage regardless of the power of sale. On the other side is the cogent argument that discontinuance of business, often the only alternative, is economically undesirable and harmful to creditors. *Etheridge* v. *Sperry* (1890) 139 U. S. 266, 277. If the mortgagor is bound to keep up stock, though authorized to enjoy the profits, there seems no reason for a conclusive presumption of fraud. *Briggs* v. *Parkman* (Mass. 1841) 2 Met. 258; contra, *Gallagher* v. *Rosenfield* (1891) 47 Minn. 507.

This view was rejected in the recent case of *Madson* v. *Rutten* (N. D. 1907) 113 N. W. 872, where, under a mortgage of this type, the mortgagee seized upon default after acquired property and sold on foreclosure to an innocent purchaser for value. The act of the mortgagee was sufficient in general to transfer title, *supra*, but, the mortgage being void for constructive fraud, no subsequent act done by the mortgagee under its authority could validate it against attaching creditors. *Mandeville* v. *Avery* (1891) 124 N. Y. 376; *Blakeslee* v. *Rossman* (1877) 43 Wis. 116; contra, *Read* v. *Wilson* (1859) 22 Ill. 376; *Barton* v. *Sitlington* (1895) 128 Mo. 164. A new transfer by the mortgagor in disregard of the prior mortgage would alone protect the mortgagee. *First Nat'l Bank etc.* v. *Enderson* (1878) 24 Minn. 435. The defendant, however, as a *bona fide* purchaser took good title on the well settled principle of fraudulent conveyances that a *bona fide* purchaser from the grantee is protected against creditors of the grantor. Bump, Fraud. Con. (4th Ed.) ch. 17.

Specific Performance With Compensation.—At law a vendor of land would be nonsuited were he to attempt to enforce a contract which he was unable to perform on his part. Where the failure of performance as to quality, *Drewe* v. *Corporation* (1804) 9 Ves. 368, or quantity, *Calcraft* v. *Roebeck* (1790) 1 Ves. Jr. 221; *Foley* v. *Crow* (1872) 37 Md. 51, is unsubstantial, equity will hear the vendor's suit since chancery, looking to the substance, Batten, Spec. Perf. 122; *Dyer* v. *Hargrave* (1805) 10 Ves. 505, and holding it unconscionable to take advantage of trivialities, *Stewart* v. *Alliston* (1815) 1 Mer. 25, will not permit the forms of law to be instruments of injustice. *Halsey* v. *Grant* (1806) 13 Ves. 73. Compensation is given as incidental, *Beyer* v. *Marks* (N. Y. 1870) 2 Sweeney 715, to complete the equitable relief and avoid circuity of action. *Erwin* v. *Meyer* (1863) 46 Pa. St. 96. This relief will be refused, however, unless two conditions are present: *Guynet* v. *Mantel* (N. Y. 1854) 4 Duer 86; *Beyer* v. *Marks, supra:* first, the defect must be immaterial; secondly, it must be measurable in money. The former is based on the consideration that equity will not enforce a contract never intended: were the defect material, the vendee probably would not have entered into the agreement. *Thomas*

v. *Deering* (1837) 1 Keen. 729; *Stewart* v. *Alliston, supra.* In the earlier cases the materiality of the deficiency was often ignored. *Drewe* v. *Hanson* (1802) 6 Ves. 675; see *King* v. *Wilson* (1843) 6 Beav. 124. But this looseness has been repudiated because of the dangers inherent in its enforcement. *Halsey* v. *Grant, supra,* see *King* v. *Barbeau* (1822) 6 Johns. Ch. 38. If the land is sold by metes and bounds, acreage may be treated as mere description, and no compensation will be given, *Moses* v. *Wallace* (1881) 7 Lea 413; *Meek* v. *Bearden* (1831) 5 Yerg. 467, provided the boundaries were as represented. *Voorhees* v. *DeMeyers* (1847) 2 Barb. 37.

When the vendee seeks compensation for a contract not performable *in specie,* the vendor's plea is that his purchaser rescind or pay in full. Such a plea relieving the vendor because he has charged himself with a liability greater than he can assume, is overruled. *Bogan* v. *Daughdrill* (1874) 51 Ala. 312; *Western* v. *Russell* (1814) 3 V. & B. 187. It would be unjust to allow him thus to shield himself behind his own default, *Waters* v. *Travis* (N. Y. 1812) 9 Johns. 450; *Erwin* v. *Meyers, supra,* and he must therefore convey with an abatement of the purchase price, irrespective of the materiality of the defect. *Graham* v. *Oliver* (1840) 3 Beav. 123; *Bennett* v. *Fowler* (1840) 2 Beav. 302, but see *Chicago Ry. Co.* v. *Durant* (1890) 44 Minn. 361; cf. *Wheatley* v. *Slade* (1830) 4 Sim. 126. The argument that because the vendor intended to sell all, he intended to sell any part of, his land, *Jones* v. *Evans* (1848) 17 L. J. Ch. 469; *Erwin* v. *Meyers, supra,* or, as often expressed, that "he cannot aver that he sold less than the whole," *Mortlock* v. *Buller* (1840) 10 Ves. 292, 315; *Marshall* v. *Cauldwell* (1871) 41 Cal. 611, is based upon a misstatement of fact. Its fallaciousness is shown in cases where the defect arises subsequent to the contract. The result reached, however, is proper, for the equity of the vendee should override the vendor's plea for either a *cy pres* execution or a suit at law.

This equity of the vendee, though not easily classifiable, appears to spring from the circumstances of the case. By construing a dictum of Lord Eldon in *Mortlock* v. *Buller, supra,* the foundation for this bar to the plea of the vendor has been sought in the doctrine of estoppel, *Rudd* v. *Lascelles* (1900) 1 Ch. 815; *Weatherford* v. *James* (1841) 2 Ala. 170. Lord Eldon's remarks, it is submitted, may more readily be explained as applying to a bar due to the equities of the situation rather than as furnishing a grounding for an estoppel *in pais.* On principle it does not appear that an estoppel is a satisfactory explanation since, even though the representation be true when made and the deficiency have resulted later, the plea of the defendant would still be barred. Cf. *Brown* v. *Ward* (1899) 110 Ia. 123; *Bass* v. *Gilliland* (1843) 5 Ala. 761. The vendee's notice of the falsity of the representation will bar an abatement, *Campbell* v. *Hay* (1828) 2 Moll. 102; *Knox* v. *Deans* (1887) 23 Fla. 64, since the offer of the vendee was probably the less because he knew the defect and to award him compensation would give a double allowance. *Peeler* v. *Levy* (1875) 26 N. J. Eq. 330; *Dyer* v. *Hargrave, supra.*

Thus if there is a material deficiency, the vendor cannot secure equitable relief, but the vendee may. This situation is regarded as an exception to the rule of mutuality; *Palmer* v. *Gould* (1895) 144 N. Y. 671; cf. *Lawrenson* v. *Buller* (1802) 1 Sch. & L. 13, but the situation would be reconcilable with a test of mutuality recently suggested. Prof. J. B. Ames, 3 COLUMBIA

LAW REVIEW 1; 1 Ill. Law Review 548. It has been stated that the rule of mutuality has no application here. *Sutherland* v. *Briggs* (1841) 1 Hare 26. It is admittedly difficult to distinguish the situation under discussion from a case of hardship where one party may enforce a contract and the other cannot. But were the mere presence of an equity in one party's favor, *ipso facto*, to take the case beyond the purview of the rule of mutuality, a doctrine would exist both difficult in its enforcement and dangerous to the continuance of the rule.

The remaining condition necessary to support this jurisdiction—that the defect must be measurable in money—is based on the conception that otherwise equity in its endeavor to do right might well work injustice. Where the difficulty arises as to defects of title, *Seaman* v. *Vaudrey* (1809) 16 Ves. 390, a reasonable estimate must suffice because an accurate estimate is impossible. (Compensation allowed) *Ramsden* v. *Hirst* (1858) 4 Jur. (N. S.) 200; (compensation refused) *Cato* v. *Thompson* (1882) 9 Q. B. D. 616. Because of the inherent difficulty of estimation, courts are divided as to awarding compensation for inchoate dower rights, see *Wilson* v. *Williams* (1857) 3 Jur. (N. S.) 810; contra, *Riesz's Appeal* (1873) 73 Pa. St. 485. If the vendee knew, however, of the vendor's marriage, compensation is always refused. *Lucas* v. *Scott* (1885) 41 Oh. St. 636; cf. *Emery* v. *Wase* (1803) 8 Ves. 505. As to defects in the quantity of land the measure of abatement generally followed, *Powell* v. *Elliott* (1866) L. R. 10 Ch. App. 424, is that adopted by a recent decision: *Baldwin* v. *Brown* (Wash. 1908) 93 Pac. 413: such proportion of the total purchase price will be deducted as the value of such proportion bore to the value of the entire tract at the time of purchase. The difficulties of estimation in cases of defect in quantity will rarely be as great as those recognized as not insuperable in cases of defect in quality, and hence in the former cases the vendee may nearly always obtain specific performance with compensation.

THE RIGHT OF A PERSONAL REPRESENTATIVE TO SUE FOR DEATH BY WRONGFUL ACT.—The common law rule, forbidding the maintenance of an action for injuries resulting from homicide, Burdick, Law of Torts 230, has been generally abrogated by statutes, see Tiffany, Death by Wrongful Act, which usually create a new cause of action, 5 COLUMBIA LAW REVIEW 545, to recover damages for the injuries sustained by certain beneficiaries. *Matter of Meekin* v. *Brooklyn etc. R. R. Co.* (1900) 164 N. Y. 145; *Holton* v. *Daley, Adm.* (1882) 106 Ill. 131. This right of action accrues whenever the wrongful act occurs within an actual, *Whitford* v. *Panama R. R. Co.* (1861) 23 N. Y. 465, or constructive jurisdiction, *McDonald* v. *Mallory* (1879) 77 N. Y. 546, subject to such a statute; and it is immaterial where the death took place, *Needham, Admx.* v. *Grand etc. Ry. Co.* (1865) 38 Vt. 294. The deceased, though instantly killed, cf. *Higgins* v. *Central etc. R. R. Co.* (1892) 155 Mass. 176, must have been entitled to maintain an action at the time of his death. *Hecht* v. *Ohio etc. Ry. Co.* (1892) 132 Ind. 507. Furthermore the right vests in the personal representative of the deceased who for purposes of suit is the owner of the claim. *Usher* v. *West Jersey R. R. Co.* (1889) 126 Pa. St. 206. Since the right is statutory these limiting conditions will be recognized by foreign tribunals as inseparable from it. 7 COLUMBIA LAW REVIEW 553. Consequently for jurisdictional purposes, though the beneficiaries may release their interests, *Pitts-*

burg etc. Ry. Co. v. *Hasea, Adm.* (1898) 152 Ind. 412, it is immaterial whether they are residents of the forum, of a sister state, *Robertson, Admx.* v. *Chicago etc. Ry. Co.* (1904) 122 Wis 66, or, on principle, are non-resident aliens. *Davidson* v. *Hill* [1901] 2 K. B. Div. 606; *Romano* v. *Brick & Pipe Co.* (1904) 125 Ia. 519; cf. 3 COLUMBIA LAW REVIEW 492; contra, *Deni* v. *Pennsylvania Ry. Co.* (1892) 181 Pa. St. 525. It is essential therefore, to determine what personal representative the legislature of the *locus delicti* intended, cf. *Taylor's Adm.* v. *Pa. etc. Co.* (1880) 78 Ky. 348, since administration may be obtained not only in the jurisdiction where the deceased was domiciled, *Holburn* v. *Pfanmiller's Adm.* (1903) 114 Ky. 831, but also wherever there are assets. *McCully* v. *Cooper* (1896) 114 Cal. 258; cf. *Christy* v. *Vest* (1873) 36 Ia. 285; see 1 Williams, Executors (7th Am. Ed.) 482, note. To sustain a grant of administration in the former case the existence of assets is unnecessary, *Holburn* v. *Pfanmiller's Adm., supra,* and in the latter the existence of an otherwise unenforcible claim therein is generally held sufficient, *Richards* v. *Iron Works* (1904) 56 W. Va. 510; *Morris* v. *Chicago etc. Ry. Co.* (1885) 65 Ia. 727; contra, *Perry, Adm.* v. *St. Joseph etc. Ry. Co.* (1883) 29 Kan. 420; cf. Brown's *Adm.* v. *Louisville etc. R. R. Co.* (1895) 97 Ky. 229; *Jeffersonville etc. R. R. Co. v. Swayne's Adm.* (1866) 26 Ind. 477, though the beneficial interest is in special parties. *Sargent* v. *Sargent* (1897) 168 Mass. 420; *Findlay* v. *Chicago etc. R. R. Co.* (1895) 106 Mich. 700. While thus there may be several administrators, all are independent, *Keaton's Distributees* v. *Campbell* (Tenn. 1840) 2 Hump. 224; *Stevens* v. *Gaylord* (1814) 11 Mass. 256, except that the ancillary administrator must, in the discretion of the court pay any surplus to the domiciliary representative, *Fretwell* v. *McLemore* (1875) 52 Ala. 124; *Young* v. *Wittenmyre* (1888) 123 Ill. 303, and that a foreign domiciliary representative, though authorized to sue by statute, sues subordinately to the local administrator. *Boughton* v. *Bradley* (1859) 34 Ala. 694; *McCully* v. *Cooper, supra.* These exceptions do not affect the several representatives' general independence. Consequently, since the statute designates no specific representative, it is reasonable to construe the statute as vesting the right to sue in any duly authorized representative. *Dennick* v. *Railroad Co.* (1880) 103 U. S. 11; *Leonard* v. *Columbia etc. Co.* (1881) 84 N. Y. 48; *Bolden* v. *Pennsylvania R. R. Co.* (1903) 205 Pa. St. 264; contra, *Richardson* v. *New York etc. R. R. Co.* (1867) 98 Mass. 85.

It is patent that a representative appointed in the *locus delicti* may recover therein. And by the great weight of authority a domiciliary representative may sue in the jurisdiction of his appointment upon a cause of action that accrued abroad. *Nelson, Adm.* v. *Chesapeake etc. R. R.* (1892) 88 Va. 971; *Leonard* v. *Columbia etc. Co., supra; Dennick* v. *Railroad Co., supra;* contra, *Woddard, Admx.* v. *Michigan etc. R. R.* (1859) 10 Oh. St. 121. But the authorities are irreconcilable where a foreign representative seeks to enforce the right. In the first case the representative acts *de jure;* in the latter two he is allowed to maintain the action only by comity. On this ground the right given by the statute of the *locus delicti, Whitford* v. *The Panama R. R. Co., supra; Memphis etc. Co.* v. *Pikey, Adm.* (1895) 142 Ind. 304, though not its procedure, *Wooden* v. *Western etc. R. R. Co.* (1891) 126 N. Y. 10; *Knight* v. *West Jersey R. R. Co.* (1885) 108 Pa. St. 250, will be recog-

nized when the statute is not penal, *Raisor* v. *Chicago etc. Ry.* (1905) 215 Ill. 47, and is similar to that of the forum. *Stewart* v. *B. & O. R. R.* (1897) 168 U. S. 445; 4 COLUMBIA LAW REVIEW 503. It is generally, however, considered impolitic to allow a foreign representative to sue, *Maysville etc. Co.* v. *Wilson's Adm.* (1893) 16 U. S. App. 236; *S. W. R. R.* v. *Pulk* (1858) 24 Ga. 356; *Denny* v. *Faulkner* (1879) 22 Kan. 90; see 1 Woerner, Am. Law of Admin., § 162. In applying this rule of policy, two theories of the administrator's status are advanced. Under one, the representative is considered as acting *virtute officii,* though not for the general estate; he must therefore obtain letters of administration in the forum, *Richards* v. *Iron Works, supra; S. C. R. R. Co.* v. *Nix, Adm.* (1882) 68 Ga. 572, which will be granted as matter of course, *Hartford etc. R. R.* v. *Andrews* (1869) 36 Conn. 213, or on grounds of assets or domicile. See *supra.* Under the other the statute is considered as imposing a trust upon him who shall be personal representative; as trustee he may therefore maintain the action *de jure. Boulden* v. *Pennsylvania R. R. Co., supra; Jeffersonville etc. R. R.* v. *Swayne's Adm., supra.*

The Supreme Court of Rhode Island has recently adhered to this latter theory in *Connor* v. *New York etc. Ry. Co.* (1908) 68 Atl. 482, holding unanimously that a domiciliary administrator of the *locus delicti,* Connecticut, could sue as trustee in Rhode Island. Neither theory contravenes the rule regarding extraterritorial power of a representative, and both make possible substantially the same conflicts. These, however, are unimportant since a release by one representative is binding upon all in the absence of fraud. *Pisana* v. *Shanley Co.* (1901) 66 N. J. L. 1; *Nelson* v. *Chesapeake etc. R. R. Co., supra,* 978. Moreover the rights of citizens, cf. 6 COLUMBIA LAW REVIEW 521; and see *Putnam* v. *Pitney* (1891) 45 Minn. 242, could be about as well protected by the extensive power of the court over the administrator as trustee as by the requirement of ancillary administration in the forum. Accordingly the greater convenience insured by the absence of this requirement as well as the greater logic in regarding the representative as trustee, since he does not act on behalf of the estate, warrants the rule of the principal case.

FRAUD IN CORPORATE MANAGEMENT AND THE RIGHTS OF A MINORITY STOCKHOLDER.—The doctrine frequently asserted, that equity protects the minority stockholder, may be stated to comprehend a right to an accounting or an injunction with respect to transactions *ultra vires* or amounting to a breach of trust. The plaintiff must be a bona fide stockholder; *Robson* v. *Dobbs* (1869) L. R. 8 Eq. 301; *Belmont* v. *Erie R. R. Co.* (1869) 52 Barb. 637; he must generally show special injury where the transaction is not *ultra vires; Hill* v. *Nisbet* (1884) 100 Ind. 341; *Hedges* v. *Paquett* (1869) 3 Ore. 77; and, the corporation being a trustee for the stockholders, in most cases he must allege and prove that the corporation is unwilling or unable to bring suit. *Hawes* v. *Oakland* (1881) 104 U. S. 450; *Greaves* v. *Gouge* (1877) 69 N. Y. 154; *Dumphy* v. *T. N. Assn.* (1888) 146 Mass. 495. But when the transaction is *ultra vires, Stebbins* v. *Perry County* (1897) 167 Ill. 567, *Botts* v. *Simpsonville etc. Turnp. Co.* (1888) 88 Ky. 54, or the corporation is under the control of the guilty parties, *Brewer* v. *Boston Theatre* (1870) 104 Mass. 378; *Wickersham* v. *Crittenden* (1892)

93 Cal. 17; *Rogers* v. *Ry. Co.* (1898) 91 Fed. 299, such proof is unnecessary. Whether or not an allegation that the directors have been requested to sue and have refused is sufficient, seems to be unsettled, some courts holding that the plaintiff need not apply to a stockholders' meeting, *Gregory* v. *Patchett* (1864) 33 Beav. 595; *Cook, Corp.* § 720, and others, that this is necessary, *Foss* v. *Harbottle* (1843) 2 Hare. 461; *Bill* v. *Western Union T. Co.* (1883) 16 Fed. 14, except in the possible case of a fraud which could not be authorized by a majority of the stockholders. *Mason* v. *Harris* (1879) L. R. 11 Ch. Div. 97. Although there be such an authorization, the plaintiff's right is not impaired, for a majority of the stockholders sustain much the same relation towards the minority as the directors sustain towards all the stockholders. *Farmers etc. Co.* v. *New York Ry. Co.* (1896) 150 N. Y. 410; *Erwin* v. *Oregon etc. Co.* (1886) 27 Fed. 625. The right of action is not limited to cases of technical fraud, but attaches to every breach of trust, including, it has been held, gross negligence. *Ives* v. *Smith* (1888) 3 N. Y. Supp. 645.

Fraud exists where the interests of the corporation are deliberately neglected in favor of a personal or other interest. An oppressive scheme of management "so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests" may be enjoined; *Gamble* v. *Queens etc. Co.* (1890) 123 N. Y. 91; see also *Hannerty* v. *Standard Theatre Co.* (1891) 109 Mo. 297; but poor management alone, although resulting in loss to the corporation, furnishes no ground for the interference of equity. *McMullen* v. *Ritchie* (1894) 64 Fed. 253; *Ellerman* v. *Chicago etc. Co.* (1891) 49 N. J. Eq. 217; *Leslie* v. *Lorillard* (1888) 110 N. Y. 519. The fraud being a deliberate service of an outside interest, the proof must show a distinct favoring of that interest. Primarily the question of the adequacy of the consideration is examined, and where it appears that an undue advantage has been taken by the corporate managers, the contracts are avoided or the performance enjoined, *Woodroof* v. *Howes* (1891) 88 Cal. 184; *Sage* v. *Culver* (1895) 147 N. Y. 241, but a substantial discrepancy between the consideration and the market value of the *res* is not conclusive. *Gamble* v. *Queens etc. Co., supra.* Material evidence may be gleaned from a conflict or intermingling of the interests involved in the transaction: as in cases of contracts between the directors, officers, or majority stockholders and the corporation, *Rogers* v. *Lafayette etc. Works* (1875) 52 Ind. 296; *Munson* v. *Syracuse etc. R. R. Co.* (1886) 103 N. Y. 58, or between two or more corporations having common directors or officers, *Ryan* v. *Leavenworth etc. Ry. Co.* (1879) 21 Kan. 365; *Fitzgerald* v. *Fitzgerald etc. Co.* (1895) 44 Neb. 463; *Pearson* v. *Concord R. R. Corp.* (1883) 62 N. H. 537, or common majority stockholders. *Meeker* v. *Winthrop Iron Co.* (1883) 17 Fed. 48; *Peabody* v. *Flint* (Mass. 1863) 6 Allen. 52; *Farmers' etc. Co.* v. *New York etc. Ry. Co., supra; Goodin* v. *C. & W. Canal Co.* (1868) 18 Oh. St. 169. Lord Hardwicke said in *Whelpdale* v. *Cookson* (1747) 1 Ves., Sr. 9, "It is not enough for the trustee to say 'You cannot prove any fraud' as it is in his power to conceal it," and upon analogy to cases of strict trust to which this reasoning is applicable and in which the transaction is effected by a single and the only trustee, many decisions have

declared these contracts void without proof of fraud in fact, citing almost invariably cases involving the interest of the technical trustee rather than that of the corporate director, *Pearson* v. *Concord R. R. Corp., supra; Munson* v. *Syracuse etc. R. R. Co., supra; Wardell* v. *R. R. Co.* (1880) 103 U. S. 651, and others have held likewise, provided the officer interested was needed to make a quorum in the board, *Butts* v. *Wood* (1867) 37 N. Y. 317, or his vote was necessary to a majority. *Bennett* v. *St. Louis & etc. Co.* (1895) 19 Mo. App. 349. These decisions, however, are overborne by the weight of authority, requiring proof of actual fraud. *Burden* v. *Burden* (1899) 159 N. Y. 287; *Shaw* v. *Davis* (1894) 78 Md. 308; *Leavenworth County Com'r's* v. *Chicago etc. Ry. Co.* (1885) 25 Fed. 219; Aff'd. 134 U. S. 688. The nature of the question is such that each case must be decided very largely upon its facts, and the tendency seems to be to resolve the whole problem into the plain question of "fairness" to the plaintiff. *Continental Ins. Co.* v. *New York etc. R. R. Co.* (1907) 187 N. Y. 225; *Colgate* v. *U. S. Leather Co.* (N. J. 1907) 67 Atl. 657.

Thus in a recent case in which a minority stockholder sued to enjoin a merger of two trust companies, it appeared that the companies had directors and officers in common and that forty-nine per cent. of the stock of the plaintiff's company was owned by a majority stockholder of the other company. The merger agreement seemed on its face grossly unfair to the plaintiff; but there was no proof of actual fraud and the court balanced the apparent inequality by taking into consideration the greater earning capacity, present and prospective, of the other company. *Colby* v. *Equitable Trust Co.* (1908) 38 N. Y. Law Jour. No. 119. The intermingling of the corporate interests being insufficient without other evidence of fraud, the decision turned upon the question of consideration; and this the court found to be adequate.

RECENT DECISIONS.

ALEXANDER B. SIEGEL, *Editor-in-Charge.*

ADMIRALTY—SHIPS AND SHIPPING—CHARTER PARTY—MASTER'S NEGLIGENCE. —The negligence of its master, who was appointed, paid, and subject to dismissal by the owner but "under the orders of the charterer as to the vessel's employment," resulted in the sinking of a scow. The owner thereupon sued the charterer for failure to return it in good condition as agreed. *Held*, the libelant could not recover. *Zabriskie* v. *City of New York* (1908) 38 N. Y. Law Jour. No. 111.

Where the ship alone is demised and the charterer appoints and controls master and crew, he alone is liable for their acts. *Meikelried* v. *West* (1876) 1 Q. B. D. 428. On the other hand, where the owner contracts to carry a cargo in his ship and by his servants, obviously he is responsible. Between these extreme classes of charter parties stands the demise of a ship fit for mercantile adventure, including master and crew. Originally the technical words of demise seem to have been regarded as sufficient to transfer control and *per se* establish the charterer's liability. *Trinity House* v. *Clark* (1815) 4 M. & S. 288; 1 Abbott, Merchant Ships, 14th Ed., 61. Later decisions more properly regard the intentions of the contractors indicated in the charter party as the basic test. *Sandemann* v. *Scurr* (1866) L. R. 2 Q. B. 86; *The Beeswing* (1884) 53 L. T. Rep. N. S. 554. The principal case correctly adopts the latter view, but unfortunately follows what has been erroneously stated as the doctrine of the English Admiralty, Abbott, Merch. Ships, 75; cf. *The Beeswing, supra; The Turgot* (1886) L. R. 11 P. D. 21, in holding that the power of dismissal rather than the right of control, Burdick, Torts, 138, 139; 3 COLUMBIA LAW REVIEW 496, is determinative of liability for the acts of master or crew. The result reached is correct, however, since so far as can be determined from the meagre statement of facts, the charterer merely could indicate what was to be done and neither the manner nor means of its accomplishment and, therefore, the master was not, even *pro hac vice*, under his control. 1 COLUMBIA LAW REVIEW 199.

ADMIRALTY—STATE LIEN IN HOME PORT—SUPPLIES FURNISHED AT REQUEST OF OWNER.—Under a contract with the owner repairs were made in the home port which was in a state where a statutory lien on the vessel was given. There was no evidence of the credit of the vessel having been impliedly or expressly pledged. *Held*, the lien attached and was enforcible in admiralty even though credit was not given to the ship. *The Rockaway* (1908) 156 Fed. 692.

Although in opposition to the civil law, Abbott Shipping, 143, and often severely criticized on principle, *The Lottawanna* (1874) 21 Wall. 558, 593, dissenting opinion; *The Canalboat Kate Tremaine* (1871) 5 Ben. 60, the rule laid down in *The General Smith* (1819) 4 Wheat. 438 that no lien is given independent of state law for repairs furnished in the home port, has been followed. *The Lottawanna, supra.* Statutory liens designed to place domestic in the same position as foreign ships, *The Samuel Marshall* (1893) 54 Fed. 396, have been given by the states for such repairs and these are enforcible in admiralty. *The Young Mechanic* (1855) 2 Curtis. 404. A lien is not implied by the maritime law if the owner is in a foreign port, *Thomas* v. *Osborn* (1856) 19 How. 22, 30, or the supplies are furnished at his request, *The Union Express* (1856) Bro. Adm. 537, because it is presumed that credit is extended to him, *The Kalorma* (1869) 10 Wall. 204, but this presumption may be rebutted. *The Gracie May* (1896) 72 Fed. 283. These statutory liens, being treated as if given by the maritime law itself, are placed upon the same footing as all maritime liens, *The Guiding Star* (1883) 18 Fed. 263, 268, and are enforced only when they comply with the

principles of maritime law. *Edwards* v. *Elliott* (1874) 21 Wall. 532; *The H. E. Willard* (1892) 52 Fed. 387. Hence the sounder view is that if the supplies are furnished at the owner's request, as in the principal case, the vessel's credit must be pledged. *The Samuel Marshall, supra; The Schooner Columbus* (1879) 5 Sawy. 487; contra, *The Iris* (1900) 100 Fed. 104; *The Illinois* (1879) 2 Flipp. 283.

BANKRUPTCY—PROVABILITY OF CONTINGENT CLAIMS—BANKRUPTCY AS AN ANTICIPATORY BREACH.—In an action on the contract to purchase stock on or before a certain day the defendant pleaded a discharge in bankruptcy. *Held*, the plea was not good since the claim was not provable. *Phœnix Nat'l Bank* v. *Waterbury* (1908) 38 N. Y. Law Journal, No. 110. See NOTES, p. 305.

CARRIERS—NEGLIGENCE OF MAIL CLERKS ON TRAINS—EVIDENCE.—The appellee, while walking along a public street in which the appellant maintained the platform of its station, was struck by a mail bag thrown in accordance with a practice known to the company from a rapidly moving train. *Held*, the company was liable for negligence in not suppressing the practice. *Pittsburgh etc. Ry. Co.* v. *Warrum* (Ind. 1907) 82 N. E. 934.

If a railroad is located upon a public highway, or if its track has been so used for a long period without objection by the company, it is bound to exercise reasonable care to prevent injury to any person thereon, *Louisville etc. Ry. Co.* v. *Phillips* (1887) 112 Ind. 59; *Barry* v. *N. Y. etc. Ry. Co.* (1883) 92 N. Y. 289; *Davis* v. *Chicago etc. Ry. Co.* (1883) 58 Wis. 646, such public use and acquiescence therein by the railroad amounting to a license. *Byrne* v. *N. Y. etc. Ry. Co.* (1887) 104 N. Y. 362. Thus a railroad company, though generally not liable for acts of mail clerks, is under a duty of reasonable care to protect persons lawfully on its premises from such negligent or reckless acts likely to cause injury, of which it had notice, or might by the exercise of reasonable care and diligence have known; *R. R. Co.* v. *Waggoner* (1900) 90 Ill. App. 556; *Snow* v. *R. R. Co.* (1884) 136 Mass. 552; and it is immaterial that the persons causing the injury were not in its employ. *Carpenter* v. *R. R. Co.* (1884) 97 N. Y. 494. If mail agents have frequently and for a long time discharged mail in this dangerous manner at a place where such is likely to cause injury, it is enough to charge the defendant with notice, it being in itself an act from which injury might reasonably be anticipated. *Shaw* v. *Ry. Co.* (1900) 123 Mich. 629; *Galloway* v. *R. R. Co.* (1894) 56 Minn. 346. The principal case is, therefore, correct.

CONSTITUTIONAL LAW—LIBERTY OF CONTRACT—INTERSTATE COMMERCE.—An Act of Congress made it a misdemeanor for an interstate carrier or its agent to dismiss an employee because of his membership in a labor union. *Held*, McKenna and Holmes, JJ. dissenting, the act was unconstitutional. *Adair* v. *U. S.* (1908) 208 U. S. 261. See NOTES, p. 301.

CONSTITUTIONAL LAW—REGULATION OF RATES BY COMMISSION.—The defendant appealed from an order of the Commission, acting pursuant to Laws 1905, c. 737, and fixing the price to be charged for gas. *Held*, Kellogg and Sewell, JJ. dissenting, the statute was constitutional under the police power, no legislative discretion was delegated, and, though the appeal provided was inadequate, a sufficient remedy by injunction remained. *Trustees etc.* v. *Saratoga Gas etc. Co.* (App. Div. 1907) 107 N. Y. Supp. 341.

This act is clearly within the police power. See 5 COLUMBIA LAW REVIEW 462; 7 id. 322. The regulation of rates is a legislative function; its reasonableness, a judicial question, *Reagan* v. *Farmers' etc. Co.* (1894) 154 U. S. 362, whether the legislature acts directly, *Smyth* v. *Ames* (1897) 169 U. S. 466, or through a commission. *Chicago etc. Ry. Co.* v. *Minnesota* (1889) 134 U. S. 418; cf. 1 Thayer's Cases on Constitutional Law 672, note. Where the rate is fixed by a commission the denial that there is a delega-

tion of legislative discretion by the principal case, by federal dicta, 6 COLUMBIA LAW REVIEW 502, and by state courts directly, *State* v. *Ry. Co.* (1888) 38 Minn. 300, as well as inferentially, *State* v. *Briggs* (1904) 45 Ore. 366, must be taken to mean that the delegation does not conflict with the theory of government, for the power given a commission and a municipality rest on the same principle, see 7 COLUMBIA LAW REVIEW 61; 21 Harv. Law Review 205, and the New York commission may do all that the legislature could. See *Smyth* v. *Ames, supra.* If on appeal, see § 19, the order is held reasonable, it becomes, by § 17, inviolable for three years. Thus no appeal is provided in case a rate subsequently becomes unreasonable, for, by § 21, a consumer can set up conclusively any existing order; cf. *Chicago etc. Ry. Co.* v. *Minnesota, supra;* and therefore the injunction, suggested as a remedy, could issue only on the ground that the statute had become unconstitutional. Yet if legislative rate regulation is to be supported at all a statute cannot be held unconstitutional merely because there is an economic possibility of its becoming unreasonable. Since this possibility in the present case is slight, cf. *Fletcher* v. *Peck* (1810) 6 Cranch 87, 128, and the defendant has had his "day in court," the conclusion of the principal case seems correct.

CONSTITUTIONAL LAW—REGULATION OF RATES BY COMMISSION—EQUAL PROTECTION OF THE LAWS.—An appeal was taken from the decision of the Appellate Division, discussed above. *Held,* the statute denied the gas companies the equal protection of the laws, since, after the expiration of the three years during which the rates were to remain fixed, the consumers might obtain a revision while the companies could not. *Trustees etc.* v. *Saratoga Gas etc. Co.* (Court of Appeals 1908) 38 N. Y. Law Jour. No. 126.

A statute does not deny equal protection of the laws when "it affects alike all persons similarly situated," *Barbier* v. *Connolly* (1884) 113 U. S. 27, where the classification is "based upon some reasonable ground," *Gulf etc. Ry. Co.* v. *Ellis* (1896) 165 U. S. 150, for example, including all engaged in a certain business, *Chicago etc. R. R. Co.* v. *Pontius* (1894) 157 U. S. 209, and has also a reasonable relation to the object sought to be accomplished. *Atchinson etc. R. R. Co.* v. *Matthews* (1898) 174 U. S. 96; *Missouri etc. Ry. Co.* v. *May* (1903) 194 U. S. 267. The policy of the legislation challenged in the principal case was the lawful one of limiting the price of gas as reasonably near to the minimum legal rate as possible; and since the allowance of a complaint by the consumer and not by the company tended to further this policy, it would seem that the discrimination between producer and consumer was based on proper grounds. Accordingly, since the statute in other respects was admittedly valid, its constitutionality might well have been maintained. See Laws of 1907, c. 429, § 72; cf. *Matter of Javrin* (1899) 174 Mass. 514.

CONSTITUTIONAL LAW—THIRTEENTH AMENDMENT—CRIMINAL ENFORCEMENT OF SERVICE CONTRACTS.—A statute, Criminal Code, § 357, provided a punishment by fine or imprisonment for the wilful and unjust breach of a farm laborer's contract after the receipt of advances. *Held,* it violated the Thirteenth Amendment, and U. S. Comp. St., 1901, p. 1266, prohibiting peonage. *Ex parte Hollman* (N. C. 1908) 60 S. E. 19.

Barring a few exceptional cases as the sailor's contract, the child's obligation to his parent, the apprentice's to his master, and, perhaps, the abandonment of employment under extreme circumstances, the legislature has no power to punish criminally the breach of a civil contract or obligation. *Clyatt* v. *U. S.* (1905) 197 U. S. 27; *Robertson* v. *Baldwin* (1897) 165 U. S. 275; *Lamar* v. *State* (1903) 120 Ga. 312, 314; contra, semble, *State* v. *Williams* (1889) 32 S. C. 123. Exceptions have been considered limited to breaches involving serious public harm or inconvenience, *Peonage Cases* (1903) 123 Fed. 671, 685, but irreparable loss to individuals under extreme circumstances, where important interests depend on the maintenance of a

status between employer and employee, would seem sufficient. If the breach completes a fraud on the employer, or is fraudulent, it seems clearly punishable. *Lamar* v. *State, supra.* Wilful and unjust failure to pay by a debtor having the means, *Ex parte Clark* (N. J. 1846) Spencer 648, and violation of a labor contract after receipt of advances without tendering the amount advanced have been held punishable. *State* v. *Murray* (1906) 116 La. 655. These are extreme cases of doubtful validity. The statute in the principal case is more stringent, affording no escape from imprisonment by repayment of advances; closely resembles the Peonage Acts of New Mexico making labor contracts specifically enforcible on pain of imprisonment; *Jaremillo* v. *Romero* (1857) 1 N. M. 190, 204; and was correctly held unconstitutional.

CORPORATIONS—CAPITAL—LIABILITY OF STOCKHOLDERS.—The trustee of a limited partnership association, organized under the Michigan statute, with a capital of $500,000 consisting of $2 cash and a secret manufacturing formula valued at $499,998, by all the original members, alleged that this was a fraud to enable the stock to be sold at less than par. *Held*, two judges dissenting, the stock was not full paid. *Wood* v. *Sloman* (Mich. 1907) 114 N. W. 317.

Original sales of stock under par are fraudulent, *N. T. W. Co.* v. *Gilfillan* (1891) 124 N. Y. 302, but stock may be issued for property, *Douglass* v. *Ireland* (1878) 73 N. Y. 100; *Phelan* v. *Hazard* (1878) 5 Dillon 45, if the value placed on it is *bona fide, Bank* v. *Alden* (1888) 129 U. S. 372; *Thurber* v. *Thompson* (N. Y. 1880) 21 Hun. 472, though it will not be held bad for a mistake, *Young* v. *Iron Co.* (1887) 65 Mich. 111, or a mere error of judgment, *Schenck* v. *Andrews* (1874) 57 N. Y. 133, unless the property had a well known value. *Boynton* v. *Andrews* (1875) 63 N. Y. 93. But it must not be a mere device, *Coleman* v. *Howe* (1895) 154 Ill. 458, such as turning back part of the stock. *Douglass* v. *Ireland, supra.* Under the statutes the filing of schedules of a limited partnership is for the creditor's benefit, *Bank* v. *Creveling Co.* (1896) 177 Pa. 270, and the property must be necessary, *Vanhorn* v. *Corcoran* (1889) 127 Pa. 255, and its description definite. *Maloney* v. *Bruce* (1880) 94 Pa. 249. Some courts hold that actual fraud or reckless conduct in valuing the property must be shown, *Young* v. *Iron Co., supra,* but the intent, *Iron Co.* v. *Drexel* (1892) 90 N. Y. 87, and the value of the property, *Boynton* v. *Hatch* (1872) 47 N. Y. 225, are always material. The principal case on its facts seems sound.

CORPORATIONS—DIRECTORS' POWERS—ADMITTING INSOLVENCY.—Directors of a corporation admitted its insolvency and willingness to be adjudged a bankrupt. The statute required the consent of the majority of the stockholders to authorize a dissolution and disposition of the property of a corporation. *Held*, the stockholders' consent was required to commit this act of bankruptcy. *In re Quartz Gold Mining Co.* (D. C. Ore. 1907) 157 Fed. 243.

Directors have an implied authority to do all acts within the ordinary course of business and the assent of the stockholders, without express provision, is not necessary. 5 COLUMBIA LAW REVIEW 324. As incident to their implied authority to pay debts, directors may make a general assignment for the benefit of creditors, *Goetz* v. *Knie* (1899) 103 Wis. 366; *Hutchinson* v. *Green* (1886) 91 Mo. 367; see *Bank Conn.* v. *Bank* (Mich. ca. 1838) Harr. Rep. 106, thus committing the fourth act of bankruptcy; and logically their power should extend to committing any, including the fifth act of bankruptcy. *In re Mutual etc. Agency* (1901) 11 Fed. 152; *In re Moench & Sons Co.* (1903) 10 Am. Bank. Rep. 656; see *In re Bates Machine Co.* (1899) 1 Am. Bank. Rep. 129. In Oregon directors of an insolvent corporation are looked upon as trustees for its creditors and the shareholders have no beneficial interest. *Hutchinson* v. *Bidwell* (1893) 24 Ore. 219. Statutes implying the shareholders' assent to acts within the directors' implied authority are intended solely to protect the stockholders' interests, *Hervey*

v. *Ill. Ry. Co.* (1884) 28 Fed. 169, 174; *Barrett & Co.* v. *Pollak & Co.* (1895) 108 Ala. 390, and are to be narrowly construed. *Parker* v. *Bank* (1898) 53 S. C. 583. When, therefore, the stockholders' interests have become subordinate, and since the proceedings do not involve a dissolution, the statute should interpose no bar to an admission of insolvency by the directors.

CORPORATIONS—FOREIGN CORPORATIONS—SERVICE OF PROCESS.—Service was made upon one whom a foreign corporation had held out as its agent, but who was not agent in fact. *Held*, the service was not valid. *Wold* v. *J. B. Colt Co.* (Minn. 1907) 114 N. W. 243.

On the theory that a corporation cannot migrate, at common law it could be served only in the state where created, *Desper* v. *The Continental etc. Co.* (1889) 137 Mass. 252; contra, *North Missouri etc. Co.* v. *Akers* (1868) 4 Kan. 453, but by statute, a state may provide for service upon a corporation as a condition upon which it may do business within its limits, *Lafayette Ins. Co.* v. *French* (1855) 18 How. 404; *St. Clair* v. *Cox* (1882) 106 U. S. 350, and to such terms, the consent may be either expressed, *Ex parte Schollenberger* (1877) 96 U. S. 369; *Gibbs* v. *Queen Ins. Co.* (1875) 63 N. Y. 114, or implied, *Connecticut etc. Co.* v. *Spratley* (1898) 172 U. S. 602. The corporation, however, must be doing business within the state, or have an agent or property therein. *Goldey* v. *Morning News* (1894) 156 U. S. 518; 7 COLUMBIA LAW REVIEW 541; contra, *Pope* v. *Terre Haute etc. Co.* (1881) 87 N. Y. 137. Upon what agents service may be made varies under the different statutes. Service has been held valid upon a traveling salesman, *Ryerson* v. *Wayne, Circuit Judge* (1897) 114 Mich. 352; *Abbeville etc. Co.* v. *Western etc. Co.* (1901) 61 S. C. 361, an insurance agent, *Moch* v. *Virginia etc. Co.* (1882) 10 Fed. 696, a receiver, *Ganebin* v. *Phelan* (1879) 5 Colo. 83, a wharf master, *Memphis etc. Co.* v. *Pickey* (1895) 142 Ind. 304, and the locomotive engineer, *Devere* v. *Delaware etc. Co.* (1894) 60 Fed. 886. Service has been held invalid upon an attorney, *Moore* v. *Freemans' etc. Co.* (1885) 92 N. C. 500, and advertisement solicitor, *Mulhearn* v. *Press Pub. Co.* (1890) 53 N. J. L. 150. In general the agent should sustain such a relation that notice of service would probably reach the corporation. *Strain* v. *Chicago etc. Co.* (1903) 216 Fed. 831; *Hiller* v. *B. & M. Ry. Co.* (1877) 70 N. Y. 223; 4 COLUMBIA LAW REVIEW 142. For this reason, one who is only an agent by estoppel is held, in accord with the principal case, not to be an agent within the contemplation of the statute. *Doe* v. *Springfield etc. Co.* (1900) 104 Fed. 684; *Mikolas* v. *Walker & Sons* (1898) 73 Minn. 305.

CORPORATIONS—HOLDING COMPANY—RIGHT TO VOTE STOCK.—The Union Pacific purchased practically all the stock of the Railroad Securities Co., a corporation holding stock of the Illinois Central. In roads competing with the latter the Union Pacific also held stock. Stockholders of the Illinois Central asked that the Railroad Securities Co. be restrained from voting the stock held by it, alleging the creation of a monopoly by the Union Pacific. *Semble*, the right of the Railroad Securities Co. to vote the stock was not affected by the purchase of its shares by the Union Pacific, even admitting that the latter could not vote such stock if held by it. *Edmunds* v. *Ill. Cent. R. R. Co.* (Ill. 1908) 36 Nat. Corp. Rep. 50.

The fiction of corporate entity is disregarded by the courts when demanded by justice or urged to cover an illegal transaction. *Bank* v. *Trebin* (1898) 59 Oh. St. 316, 326; *Home Ins. Co.* v. *Barber* (1903) 63 Neb. 644; *U. S.* v. *Milwaukee Ref. Trans. Co.* (1905) 142 Fed. 247, 255. Thus, where the stockholders are without equity recovery is refused the corporation; *Ark. etc. Co.* v. *Farmers' etc. Co.* (1889) 13 Colo. 587; *Home Ins. Co.* v. *Barber, supra;* the validity of a mortgage made by the stockholders is sustained in equity; *First Nat. Bank* v. *Winchester* (1898) 119 Ala. 168; and subsidiary corporations are restrained from doing acts which would be unlawful for the corporation holding their stock. *Stockton* v. *The Cent. R.*

R. Co. (1892) 50 N. J. Eq. 52, 74; *Cent. R. R. of N. J.* v. *Penn. R. R. Co.* (1879) 31 N. J. Eq. 475. As equity recognizes the corporation as in reality but an association of individuals, Clark & Marshall, Corps. § 7, the position taken by the court would seem unsound. The decision, however, is sustained on other grounds not involving this proposition.

CORPORATIONS—MAJORITY STOCKHOLDERS AS TRUSTEES—LIABILITY.—Railroads A., N. and S. contracted with B., a bridge company, to pay as tolls a rate high enough to run B. N. owned the majority of the stock of B. A., N. and B. wrongfully agreed to keep the tolls higher than necessary and rebated to A. and N. S. sued B. and recovered its *pro rata* share. A minority stockholder of B. sued N. for all the rebates. *Held*, N. was liable as a joint and several tortfeasor for the whole amount. *Dodd* v. *Pitts. Ry. Co.* (Ky. 1908) 106 S. W. 787.

The majority stockholders of a corporation assume the same trust relation toward the minority, *Trust Company* v. *Ry. Co.* (1896) 150 N. Y. 410, that the corporation usually bears to all the stockholders, see 3 COLUMBIA LAW REVIEW 487, and, being liable for breaches of trust, *Ervin* v. *Ry. & Nav. Co.* (1886) 27 Fed. 625; *Hun* v. *Cary* (1880) 82 N. Y. 65, must respond in damages for whatever loss results from their fraudulent acts. *Barr* v. *R. R.* (1884) 96 N. Y. 444; *Wilkinson* v. *Dodd* (1885) 40 N. J. Eq. 123. The minority stockholders, as they are the real parties in interest, *March* v. *R. R.* (1862) 43 N. H. 515; *Butts* v. *Wood* (N. Y. 1862) 38 Barb. 181, can sue in equity to restrain illegal acts, see 8 COLUMBIA LAW REVIEW 313, for an accounting, *Barr* v. *R. R.*, *supra*, or to recover misappropriated funds, *Sage* v. *Culver* (N. Y. 1893) 71 Hun. 42, if they show that there has been a breach of duty, *Dodge* v. *Woolsey* (U. S. 1855) 18 How. 331, that the corporation refused to sue, see 5 COLUMBIA LAW REVIEW 398, though that is not necessary in the cases of collusion, *Brewer* v. *Boston Theatre* (1870) 104 Mass. 378, or control by another corporation, *Rogers* v. *Ry. Co.* (1898) 91 Fed. 299, and that they have suffered an injury. *Crook* v. *Jewett* (N. Y. 1854) 12 How. Pr. 19; *Hill* v. *Nisbet* (1884) 100 Ind. 341. Thus in the principal case N., the majority, using its control to the injury of the minority of B., is liable for all the damages resulting from the breach of trust though not as a tortfeasor as held in the principal case.

CORPORATIONS—PROCEEDINGS BY CREDITOR—TRUST FUND.—At the time of its insolvency, a corporation owned a tract of land, of which a stockholder had taken possession, claiming ownership. *Semble*, the land, as part of the assets, was a trust fund, and the creditor need not exhaust his legal remedies before demanding enforcement of the trust. *Swartley* v. *Oak Leaf Creamery Co.* (Ia. 1907) 113 N. W. 496. See NOTES, p. 303.

CORPORATIONS—RIGHTS OF MINORITY STOCKHOLDER—FRAUD.—A minority stockholder sued to enjoin a merger of two trust companies having common directors and officers and forty-nine per cent. of the stock of the plaintiff's company being owned by a majority stockholder of the other company. The plaintiff alleged that the merger agreement was ultra vires and unfair. *Held*, the agreement was not ultra vires, and, there being no proof of actual fraud, the evidence failed to show that it was unfair. *Colby* v. *Equitable Trust Co.* (1908) 38 N. Y. Law Jour. No. 119. See NOTES, p. 313.

CRIMINAL LAW—INSANITY—HOMICIDE—REDUCTION OF DEGREE OF MURDER.—In a prosecution for murder in the first degree, the plea of insanity was interposed. *Held*, the State must prove beyond a reasonable doubt that the accused had a mind capable of deliberation and of forming a purpose. *State* v. *Pressler* (Wyo. 1907) 92 Pac. 806.

The view that insanity is an affirmative defense, *State* v. *Lawrence* (1870) 57 Me. 574, is here rejected for the better doctrine that the possession of a mind capable of the mental operations involved is an essential of the crime charged. *People* v. *Garbutt* (1868) 17 Mich. 9; *People* v. *McCann* (1857) 16 N. Y. 58. See 4 COLUMBIA LAW REVIEW 507. Logically, it

should follow that just as voluntary drunkenness, while itself no excuse or mitigation, *People* v. *Rogers* (1858) 18 N. Y. 9, may be considered in determining the presence of a required specific state of mind, Clark & Marshall, Crimes, 2 Ed. 161; N. Y. Pen. Code § 22; *Aszman* v. *State* (1889) 123 Ind. 347; *Willis* v. *Com.* (Va. 1879) 32 Gratt. 929, mental disease which makes impossible the formation of a deliberate purpose to kill, must reduce murder to its second degree, though the accused be legally sane within the arbitrary rule of *M'Naghten's Case* (1843) 10 C. & F. 200. For this view there is some support in authority, *Anderson* v. *State* (1876) 43 Conn. 514; *Hempton* v. *State* (1901) 111 Wis. 127, 135; *Dejarnette* v. *Com.* (1881) 75 Va. 867, 880 (semble); *Jarvis* v. *State* (Ark. 1902) 67 S. W. 76 (semble); Tex. Cr. Code, Art. 41; *Ex Parte Evers* (1891) 29 Tex. App. 539; *Evers* v. *State* (1892) 31 Tex. Cr. R. 318, 326 (temporary insanity produced by liquor); but a greater number of Courts refuses to recognize any insanity short of that which acquits altogether. *Com.* v. *Hollinger* (1899) 190 Pa. St. 155; *Com.* v. *Wirebeck* (1899) 190 Pa. St. 138, 151; *Com.* v. *Barner* (1901) 199 Pa. St. 335; *U. S.* v. *Lee* (D. C. 1886) 4 Mackey 489; *Sindram* v. *People* (1882) 1 N. Y. Cr. Rep. 448, aff'd 88 N. Y. 196; *Sage* v. *State* (1883) 91 Ind. 141; *State* v. *Kolowsky* (1882) 11 Mo. App. 584; *Baldwin* v. *State* (1848) 12 Mo. 223, 233. It is submitted, however, that these decisions fail to distinguish between insanity as a relief from all criminal accountability, and that urged merely in denial of some particular mental constituent of the given crime. See *Sindram* v. *People, supra* (semble); but cf. s. c. 88 N. Y. 196. Cf. Whart., Cr. Law, 10 Ed., § 62.

EQUITY—SPECIFIC PERFORMANCE—HARDSHIP—LACHES.—A tract was sold by A. to B. and C., each to own a half. Thirteen years after division, C. having meanwhile made valuable improvements, rich mineral deposits were discovered. Thereupon, B., claiming that there had been a mistake as to the quantity of land, and that the allotment had been incorrect, sued A. and C. for rectification and specific performance. *Held*, since the delay of the plaintiff was unexcused and hardship caused by the change in circumstances would ensue, equity should deny relief. *Heflin* v. *Heflin* (W. Va. 1907) 59 S. E. 745.

Although some authorities maintain that the parties assume the risk of any contingencies that may later arise, and that Chancery should, therefore, exercise jurisdiction only where hardship arises from the agreement itself, Fry, Spec. Perf., 3rd Am. Ed., § 397 et seq.; *Lawder* v. *Blachford* (1815) Beat. 522; *Marble Co.* v. *Ripley* (1870) 10 Wall. 339, 356, the apparent weight of authority takes account also of subsequent extrinsic circumstances, where such could not reasonably, *Franklin etc. Co.* v. *Harrison* (1891) 145 U. S. 459, 473, have been foreseen. *City of London* v. *Nash* (1747) 3 Atk. 512; *Webb* v. *Direct etc. Ry. Co.* (1852) 1 DeG. M. & G. *521; *Willard* v. *Tayloe* (1869) 8 Wall. 557; *Leicester Piano Co.* v. *Front etc. Co.* (1893) 55 Fed. 190; *Stokes* v. *Stokes* (1898) 155 N. Y. 581, 590; cf. *Prospect etc. Ry. Co.* v. *Coney Island etc. Ry. Co.* (1894) 144 N. Y. 152. The latter position is sounder, since to look at the full relative effects of a decree on the parties all circumstances, collateral as well as intrinsic, should be taken into account. See 8 COLUMBIA LAW REVIEW 41. Under this theory, the unforeseen rise in value and the discovery of valuable mineral deposits make out a sufficiently strong equity in the defendant's favor, alone to justify the result reached. The *ratio decidendi*, however, rested not merely on this, but also on the additional factor of the plaintiff's delay which, apart from the suspicion cast thereby on his good faith, *Ford* v. *Euker* (1899) 86 Va. 75, might have warranted *per se* a refusal of relief on the distinct ground of laches. 6 COLUMBIA LAW REVIEW 578. See *Darling* v. *Cumming's Ex'r* (1896) 92 Va. 521.

EQUITY—SPECIFIC PERFORMANCE WITH COMPENSATION.—The plaintiff agreed to buy a parcel of land. Before the time for conveying the defendant's title as to five acres failed. The plaintiff sued for specific performance with

compensation. *Held*, the amount to be deducted was such proportion of the whole purchase price as the value of the five acres bore to the value of the whole tract. *Baldwin* v. *Brown* (Wash. 1908) 93 Pac. 413. See NOTES, p. 309.

EVIDENCE—HUSBAND AND WIFE—DECLARATION OF ACCESS OR NONACCESS.—A husband sued for divorce because of the wife's alleged pregnancy by another before marriage. *Held*, evidence by either spouse of access or nonaccess was inadmissible. *Wallace* v. *Wallace* (Ia. 1908) 114 N. W. 527.

Since a dictum of Lord Mansfield, *Goodright* v. *Moss* (1777) 2 Cowp. 591, although the older law was clearly otherwise, *Pendrell* v. *Pendrell* (1732) 2 Stra. 925; Bull., N. P. 287, it has been almost universally held that "decency, morality and policy" forbid the introduction, not merely in legitimation but in all causes, *Rabeke* v. *Baer* (1897) 115 Mich. 328, of testimony of access, *Boykin* v. *Boykin* (1874) 70 N. C. 262; Jones, Evid. § 96, or nonaccess, *Tioga County* v. *South Creek Township* (1874) 75 Pa. St. 433, on the part of either spouse to rebut the presumption of legitimacy which always arises from postnuptial birth, Co. Litt. 244a; *Hargrave* v. *Hargrave* (1846) 9 Beav. 552, even where conception must have been antenuptial. *Dennison* v. *Page* (1859) 29 Pa. St. 420. This evidence would assume undue probative proportions with the jury. *Mink* v. *State* (1884) 60 Wis. 583, 586, besides affording opportunity for fraud and collusion, cf. *The Aylesford Peerage* (1885) L. R. 11 App. Cas. 1, 16, and as the effect of a bastardizing of issue by a parent is clearly unfortunate, it should not be effectuated by untrustworthy testimony. *Hemmenway* v. *Turner* (Mass. 1861) 1 Allen 209. While these considerations appear to justify the rule at least as to evidence of nonaccess, its basis in both early, *Goodright* v. *Moss, supra*, and modern decisions, *Estate of Mills* (1902) 137 Cal. 298, rests solely on the vague ground of the indecency of the testimony which in the light of concededly admissible evidence, cf. *Chamberlain* v. *People* (1861) 23 N. Y. 85, is unconvincing. A recent attack on the rule, Wigmore, Evid. § 2064, based upon its avowed reason seems, therefore, well founded; the principal case, however, follows the authorities both in result and reasoning, though at least the nonaccess part of the rule is supportable on stronger grounds.

LANDLORD AND TENANT—HOLDING OVER—RIGHT OF SUBSEQUENT LESSEE.—The tenant whose lease expired on the day on which plaintiff's lease began, held over. *Held*, the plaintiff could not recover rent. *United Merchants Realty and Improvement Co.* v. *Roth* (1907) 107 N. Y. Supp. 511.

The right of a landlord to sue the lessee holding over as his tenant for another term is in the earlier cases based on a contract implied in fact. *Osgood* v. *Dewey* (1816) 13 Johns. 239. In England and a few states the actual assent of the lessee must be shown, *Jones* v. *Shears* (1836) 4 A. & E. 832; *Edwards* v. *Hale* (Mass. 1864) 9 Allen 462, while in some states the holding over is regarded as conclusive evidence of such assent. *Parker* v. *Page* (1902) 41 Ore. 579. But in the United States generally the right exists independently of consent, the new tenancy being implied by law, *Schuyler* v. *Smith* (1873) 51 N. Y. 309, to protect the landlord from the tenant's breach of his duty to surrender the premises. *Wolffe* v. *Wolffe* (1881) 69 Ala. 549; *Hemphill* v. *Flynn* (1845) 2 Pa. St. 144; *Herter* v. *Mullen* (1899) 159 N. Y. 28, opinion of Martin, J. There being no breach of duty to a subsequent lessee, a tenancy under him should not be implied, cf. *Heirs of Balfour* v. *Balfour* (1881) 33 La. Ann. 297, nor is there a privity of estate between them, for there is none even between the holdover and the landlord before the latter has exercised his option, *Smith* v. *Littlefield* (1873) 51 N. Y. 539, nor will the law raise an assumpsit from the mere occupation of the premises, *Hill* v. *U. S.* (1892) 149 U. S. 593; *Hurley* v. *Lamereaux* (1892) 29 Minn. 138, and since summary proceedings in New York can be brought only by a landlord against a tenant, *Imbert* v. *Hallock* (1862) 23 How. Pr. 456, and no action lies against the lessor, who

does not covenant to give actual possession, *Gardner* v. *Keteltas* (N. Y. 1842) 3 Hill. 330; contra, *Coe* v. *Clay* (1829) 5 Bing. 440, the lessee's proper remedy is ejectment. *Gardner* v. *Keteltas, supra.*

MORTGAGES—AFTER-ACQUIRED PERSONALTY—POWER OF SALE.—Under a mortgage of a stock of goods which empowered the mortgagor to sell without accounting for the proceeds, the mortgagee seized after-acquired property and sold on foreclosure to an innocent purchaser for value. A judgment creditor of the mortgagor sued the sheriff who refused to levy on the property. *Held,* the purchaser obtained good legal title. *Madson* v. *Rutten* (N. D. 1907) 113 N. W. 872. See NOTES, p. 307.

NEGOTIABLE PAPER—CONSIDERATION—EXTENSION OF TIME.—The defendant in consideration of the extension of time on a note released all claims for defects in the machine for which the note was the purchase price. *Held,* there was sufficient consideration for his promise and he could not set up any defense arising from defects. *Sheffield et al.* v. *International Harvesting Machine Co.* (Ga. 1908) 59 S. E. Rep. 1113.

While an extension of time is generally a valid consideration, *Brown* v. *Bank* (1888) 115 Ind. 572; *Maclaren* v. *Percival* (1886) 102 N. Y. 675, if the postponement of maturity be of a liability legally non-existent it can obviously not so operate; and any efficiency as consideration must be found in the forbearance from suit. The right to bring suit must therefore be established. *Wade* v. *Simeon* (1846) 2 C. B. 548; *Prater* v. *Miller* (1854) 25 Ala. 320. As to this there are two prevailing doctrines; first, the person forbearing must have a *bona fide* belief that he possesses a substantial cause of action; *Callisher* v. *Bischoffsheim* (1870) 5 Q. B. 449; *Rue* v. *Meirs* (1887) 43 N. J. Eq. 377; *McKinley* v. *Watkins* (1851) 13 Ill. 140; second, that there must exist that belief and in addition a reasonable foundation for it arising from a doubt in the law or the facts. *Mortgage Co.* v. *Henderson* (1886) 111 Ind. 24; *Mulholland* v. *Bartlett* (1874) 74 Ill. 58. The first doctrine allows any one to use the courts who satisfies his conscience, the second lays down a usual test of conduct, prevents unfounded litigation and limits legal rights no more than the first. The latter doctrine is the more reasonable, but the principal case is sound in either aspect.

PATENTS—JURISDICTION—FEDERAL AND STATE COURTS.—The defendant, an assignee of the plaintiff's patent, manufactured articles under a different patent. The plaintiff sued for royalties payable under the assignment contract on the articles thus manufactured, claiming the other patent to be an infringement on his own. *Held,* on demurrer, the federal court had jurisdiction. *Leslie* v. *William Mann Co.* (1907) 157 Fed. 236.

Federal courts have jurisdiction of actions to enforce a right conferred by the patent laws, U. S. R. S. § 711; *White* v. *Rankin* (1892) 144 U. S. 628, but if the suit is on a contract for the use of an invention, a state court can entertain the proceeding, *March* v. *Nichols, Shepard Co.* (1891) 140 U. S. 344, even though by way of defense a question of infringement or invalidity, *Herzog* v. *Heymann* (1897) 151 N. Y. 587, is in issue. *Pratt* v. *Paris Gas Light Co.* (1897) 168 U. S. 255; cf. *Atherton Machine Co.* v. *Atwood-Morrison Co.* (1900) 102 Fed. 949. It would seem that the state courts have exclusive jurisdiction of such controversies. See *Hartell* v. *Tilghmann* (1878) 99 U. S. 547; *Albright* v. *Teas* (1882) 106 U. S. 613. An action for royalties was, however, held to arise under the patent laws in *St. Paul Plough Works* v. *Starling* (1887) 127 U. S. 376, but this decision is inconsistent with *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.* (1901) 185 U. S. 282. See *Hubbard* v. *Allen* (1888) 123 Pa. St. 188. A state court can determine only collaterally, *Slemmer's Appeal* (1868) 58 Pa. St. 155, the title to a patent, *Ruth* v. *Boyd* (1892) 51 Fed. 821, or its validity, *Marston* v. *Swett* (1876) 66 N. Y. 206; *Sherman* v. *Champlain Co.* (1858) 31 Vt. 162, but can never enjoin its use, *Stone* v. *Edwards* (1871) 35 Tex. 556; *Continental Store Co.* v. *Clark* (1885) 100 N. Y. 365, nor will a state

court entertain an action based on a promise implied in law from an infringement. *DeWitt* v. *Elmira Co.* (1876) 66 N. Y. 459; *Denise* v. *Swett* (1894) 142 N. Y. 602. In the principal case the cause of action appears to be based on the contract, and the allegations of infringement made to anticipate a defense seem not to be a foundation for federal jurisdiction.

PERSONAL PROPERTY—REPLEVIN—POSSESSION OF PROPERTY—CUSTODIA LEGIS.—The defendant having obtained possession of property under a writ of replevin against a third party, during the pendency of the action was sued in replevin by the plaintiff. *Held*, the plaintiff was not forced to wait until the termination of the first suit, the property not being *in custodia legis*. *Coleman* v. *Reynolds* (Mo. 1907) 105 S. W. 1070.

Where property has been replevied and delivered to the plaintiff, it is not considered *in custodia legis* so as to prevent a person claiming adversely to both parties from maintaining a second replevin for it against the plaintiff. *Hogan* v. *Deuell* (1866) 24 Ark. 216; *Ilsey* v. *Stubbs* (1809) 5 Mass. 280; *Kelleher* v. *Clark* (1883) 135 Mass. 45; *Coen* v. *Watkins* (1895) 62 Mo. App. 502; *Weiner* v. *Van Rensselaer* (1881) 43 N. J. L. 547. Since the writ is now used principally to try title or the right to possession, the plaintiff cannot pending the litigation convey a title which will conclude or protect anyone. *Lockwood* v. *Perry* (Mass. 1845) 9 Metc. 440; *Mohr* v. *Langan* (1901) 162 Mo. 474. Consequently, a levy by a party to the suit, his grantees or privies, *McKinny* v. *Purcell* (1882) 28 Kan. 446, or a cross replevin by the defendant or one claiming under him, *Sanborn* v. *Leavitt* (1862) 43 N. H. 473; *Hines* v. *Allen* (1867) 55 Me. 114, is not allowed pending the litigation. Accordingly a principal or bailor cannot maintain replevin during the pendency of a similar action against his agent or bailee, *Larsen* v. *Nichols* (1895) 62 Minn. 256, unless a judgment therein would not determine the title or right to possession of the principal or bailor. *White* v. *Dolliver* (1873) 113 Mass. 400; *Westbay* v. *Milligan* (1898) 74 Mo. App. 179. In the principal case, as there was no privity between the third party and the plaintiff, the decision is clearly right.

PLEADING AND PRACTICE—ATTACHMENT—SITUS OF ATTACHED CHOSE IN ACTION.—In an action on contract, brought in New York against a Canadian corporation, it was sought to attach a debt payable in New York, due from a resident of New Jersey who transacted all his business at his New York office. *Held*, the levy was valid. *Flynn* v. *White* (1907) 107 N. Y. Supp. 860.

The United States Supreme Court has held, in applying the "full faith and credit" clause, that, for purposes of attachment or garnishment, a debt has its situs wherever the debtor may be sued upon it. *Harris* v. *Balk* (1905) 198 U. S. 215. In New York the situs of a debt has been restricted to the residences of the debtor and the creditor. *Nat'l Broadway Bank* v. *Sampson* (1904) 179 N. Y. 213. This rule would seem to arise, not from a logical application of legal doctrine, cf. 7 COLUMBIA LAW REVIEW 544, but from a limitation of procedure, since the notice of attachment, unlike the summons in garnishment, *Plimpton* v. *Bigelow* (1883) 93 N. Y. 592, 601, does not give personal jurisdiction over the attachment debtor, and the process would scarcely be efficacious against a non-resident. *Carr* v. *Corcoran* (N. Y. 1899) 44 App. Div. 97, 99. The rule, however, is applied only so far as its reason demands. Thus, a debt due from a foreign corporation doing its principal business in New York, has been held a *res* within the state if arising out of transactions therein, *India Rubber Co.* v. *Katz* (N. Y. 1901) 65 App. Div. 349; *Lancaster* v. *Spotswood* (N. Y. 1903) 41 Misc. 19; aff'd (1903) 86 App. Div. 627, but not, if arising elsewhere. *Bridges* v. *Wade* (N. Y. 1906) 113 App. Div. 350. Non-resident natural persons doing their daily business in New York seem equally to come within the spirit of these considerations; and the principal case seems a valid extension of the New York doctrine. Cf. 8 COLUMBIA LAW REVIEW 58.

PLEADING AND PRACTICE—CONSTRUCTION OF COMPLAINT—TORT OR CONTRACT.—The plaintiff alleged delivery of a corpse to the defendant railroad for shipment, defendant's duty to transfer the corpse at a junction point, and negligent, wrongful, and unlawful failure to transfer, praying damages for mental anguish. *Held*, one justice dissenting, the action was *ex contractu*. *Beaulieu* v. *Gt. Northern Ry. Co.* (Minn. 1907) 114 N. W. 353.

Until *Dale* v. *Hall* (1750) 1 Wils. 281, actions against common carriers sounded in tort. *Ansell* v. *Waterhouse* (1817) 6 M. & S. 385. Thereafter, assumpsit and tort were used indifferently, *Denman* v. *Chicago, etc. Ry. Co.* (1897) 52 Neb. 140, the pleader's election appearing in the form of action. Under the reformed procedure, the statement of facts in the complaint controls the construction, *Conaughty* v. *Nichols* (1870) 42 N. Y. 83. Thus, averments of a promise upon consideration and breach thereof state an action in contract; *Tallassee, etc. Co.* v. *Western Ry.* (1897) 117 Ala. 520; *a fortiori*, profert of the contract. *Whittenton Mfg. Co.* v. *Memphis, etc. Co.* (1884) 21 Fed. 896; Hutchinson, Carriers, 3rd Ed., § 1333. But the words "undertake," "promise," and the like, are not decisive, Hutchinson, *supra*, § 1328; and failure to aver consideration is fatal to such a construction. See *Smith* v. *Seward* (1846) 3 Pa. St. 342. If the contract is alleged as matter of inducement only, *New Orleans, etc. Ry. Co.* v. *Hurst* (1859) 36 Miss. 660, the gravamen of the complaint being the defendant's duty and violation thereof, the action is *ex delicto*. *Nelson* v. *Gt. Northern Ry. Co.* (1903) 28 Mont. 297; Pomeroy, Code Remedies, 4th Ed. § 464. Other indications of the action are the form of summons, *Miller* v. *Barber* (1876) 66 N. Y. 558, 564, and prayer for relief, *Chambers* v. *Lewis* (N. Y. 1860) 2 Hill 591; contra, Pomeroy, § 471, and the use of legal conclusions and descriptive phrases. Pomeroy, § 464. In ambiguous cases, the complaint in actions against common carriers is construed as sounding in tort. *Central, etc. Ry. Co.* v. *Chicago Portrait Co.* (1904) 122 Ga. 11; *Whittenton Mfg. Co.* v. *Memphis, etc. Co. supra; Nelson* v. *Gt. Northern Ry. Co., supra*. The principal case, therefore, seems incorrect.

PUBLIC SERVICE CORPORATIONS—SLEEPING CAR COMPANY—THEFT BY SERVANT.—A passenger on a sleeping car negligently lost her diamond ring. It was subsequently stolen by the porter. *Held*, the plaintiff's negligence was no defense. *Pullman Co.* v. *Vanderhoven* (1908) 107 S. W. 147.

While a sleeping car company is not a common carrier, or an innkeeper, *Blum* v. *Southern Pullman Palace Car Co.* (1876) Fed. Cases 1574, the duty is laid upon it of protecting the passenger's property. *Lewis* v. *New York Sleeping Car Co.* (1887) 143 Mass. 267. Contributory negligence of a passenger is a good defense to any loss or theft save by an employee. *Pullman Car Co.* v. *Matthews* (1889) 74 Tex. 654. The liability of a sleeping car company to its passengers for wilful acts of its employees, whether done in the scope of their employment or not, is the same as that of a common carrier, *Campbell* v. *Pullman Car Co.* (1890) 42 Fed. 484; Hutchinson, Carriers, § 1145, and rests not on the negligence of the company, but on its duty to protect the passenger. *Haver* v. *The Central R. R. Co.* (1898) 62 N. J. L. 282; *Dwinelle* v. *N. Y. C. & H. R. R.* (1890) 120 N. Y. 117. Contributory negligence is only a defense where the defendant is also negligent. *Ruter* v. *Foy* (1877) 46 Ia. 132. Cases holding that abusive language on the passenger's part exonerates the railroad from liability for an assault, *Georgia R. R. Co.* v. *Hopkins* (1899) 108 Ga. 324; contra. *B. & O. R. R.* v. *Barger* (1894) 80 Md. 23, rest not on contributory negligence, but on the violation of the reciprocal duties the passenger owes to the railroad, thereby forfeiting his right to protection. *Scott* v. *Railroad Co.* (1889) 53 Hun. 414. In any event, the plaintiff's negligence in the principal case would not seem the proximate cause of the injury. *Root* v. *Sleeping Car Co.* (1887) 28 Mo. App. 199.

REAL PROPERTY—EJECTMENT—CONDITIONS SUBSEQUENT—RE-ENTRY.—The plaintiff having conveyed property on condition that the grantee support and maintain her, brought ejectment because of non-performance of the

condition. *Held*, two judges dissenting, the action would not lie as an allegation of re-entry or its equivalent was necessary to revest title in the grantor. *Mash* v. *Bloom* (Wis. 1907) 114 N. W. 457.

At common law, on a breach of a condition subsequent, the grantor could re-enter, *Spaulding* v. *Hallenbeck* (N. Y. 1862) 39 Barb. 79, even without any reservation of that right; *Gray* v. *Blanchard* (Mass. 1829) 8 Pick. 284; but the grantor's title did not revest until entry, *Throp* v. *Johnson* (1852) 3 Ind. 343, unless the estate was less than a freehold, *Kenner* v. *Am. Co.* (Ky. 1872) 9 Bush. 202, and hence a formal entry had to be shown before ejectment could be brought. *Ludlow* v. *R. R. Co.* (N. Y. 1852) 12 Barb. 440. This rule has been generally modified by statute; *Ry. Co.* v. *Cook* (1899) 98 Fed. 281; but jurisdictions are not in accord as to the extent of the modification. The majority holds that unless the grant expressly provides that the breach is to work a forfeiture, *Cornelius* v. *Ivins* (N. J. 1857) 2 Dutch. 378, or render the grant void, *Cowell* v. *Springs Co.* (1879) 100 U. S. 55, title will still not be revested without re-entry or some equivalent formal act. *Nicoll* v. *R. R. Co.* (1854) 12 N. Y. 121; *Adams* v. *Lindell* (1878) 5 Mo. App. 197. Some allow the bringing of the action to operate as an equivalent, *Ritchie* v. *Ry. Co.* (1895) 55 Kan. 36, which is unsound if any act is needed to revest title, since there should be title before action brought; *Church* v. *R. R. Co.* (1890) 78 Wis. 131; while others retain the strict common law rule. *Marwick* v. *Andrews* (1846) 25 Me. 525. The principal case is in accordance with the modern tendency.

RECEIVERS—STREET RAILWAYS—CONFLICT OF JURISDICTION.—Creditors of a street railway applied for a receiver in the federal courts. *Held*, jurisdiction would not be refused merely because a state receivership would be more convenient. *Pennsylvania etc. Co.* v. *New York City Ry. Co.* (1907) 157 Fed. 440.

Though there has been authority that, under the Bankruptcy Act, federal courts have exclusive power to appoint receivers, *In re Merchants Ins. Co.* (1871) 3 Biss. 162, it is now universally held that state and federal courts have concurrent jurisdiction, *Judd* v. *Bankers, etc. Tel. Co.* (1887) 31 Fed. 182; *Davis* v. *Alabama etc. Ry. Co.* (1873) 1 Woods 661; *Matter of Clark and Bininger* (1870) 4 Benedict 88, and that court which first entertains the controversy retains it, *State ex rel. Merriam* v. *Ross* (1894) 122 Mo. 435; *Bell* v. *Ohio etc. Co.* (1858) 1 Biss. 260; *Conkling* v. *Butler* (1865) 4 Biss. 22, unless the proceedings are utterly unauthorized. *Buchanan* v. *Smith* (1872) 16 Wall. 277, 309. There are cases holding that, since receivership proceedings are *quasi in rem*, jurisdiction attaches to that court which first obtains control of the *res*, *Wilmer* v. *The Atlanta etc. Ry. Co.* (1875) 2 Woods 423 (per Bradley, J.); *East Tennessee etc. Ry. Co.* v. *Atlanta etc. Ry. Co.* (1892) 49 Fed. 608, but the great weight of authority regards the filing of the bill and service of process as constituting an equitable levy, and therefore that court has jurisdiction where the action was first commenced. *Wilmer* v. *Atlanta etc. Ry. Co.* (1875) 2 Woods 409 (per Woods, J.); *Adams* v. *Mercantile Trust Co.* (1895) 66 Fed. 617; *Lewis* v. *American Naval Stores Co.* (1902) 119 Fed. 391; 8 COLUMBIA LAW REVIEW 213. When a court has power to appoint a receiver, it does not seem to be the practice to refuse relief to petitioners merely because they might have proceeded more advantageously elsewhere, see *Griswold* v. *Cent. Vt. Ry. Co.* (1881) 9 Fed. 797; *East Tennessee etc. Co.* v. *Atlanta etc. Ry. Co.*, *supra*, and therefore the decision in the principal case is in accord with the general judicial tendency.

STATUTES—RECORDING ACTS—PURCHASER FOR VALUE—ATTACHING CREDITOR.—L. conveyed unoccupied land to D., receiving a purchase-money mortgage, which was immediately recorded. D. immediately conveyed to the plaintiff's grantor, both of the deeds being unrecorded. The defendant, learning from L. of the conveyance to D., and having examined the record title, attached the land as D.'s, before the deeds were recorded. The defendant

claims under his attachment and the execution sale. A statute declared that an attachment, when recorded, constituted the attaching creditor an innocent purchaser for value. *Held*, the defendant's deed was a cloud upon the plaintiff's title. *Jennings* v. *Lentz* (Ore. 1908) 93 Pac. 327.

The aforementioned statute has been construed to put the attaching creditor on the same footing as a cash buyer, *Riddle* v. *Miller* (1890) 19 Ore. 468, thus leaving his good faith an issue of fact in every case. *Rhodes* v. *McGarry* (1890) 19 Ore. 222. As no actual *mala fides* was shown, the decision in the principal case professes to rest upon the ground that the defendant was put upon inquiry by the absence of a record title in D. *Citizens' Bank* v. *Dayton* (1886) 116 Ill. 257. But a purchaser is only chargeable with such knowledge as the inquiry would lead to, *Johnson* v. *Erlandson* (1905) 14 N. D. 518; *Davis* v. *Lutkiewicz* (1887) 72 Iowa 254, and the defendant, therefore, took the risk only of a prior conveyance by D.'s grantor, the record owner. *Calder* v. *Chapman* (1866) 52 Pa. St. 359; *Bingham* v. *Kirkland* (1881) 34 N. J. Eq. 229. Failure to make further inquiries may be a suspicious circumstance when a purchaser buys property for cash, *Kirsch* v. *Tozier* (1894) 143 N. Y. 391, 397, but in the case of an attaching creditor it can hardly, in itself, be considered bad faith. *Crossen* v. *Oliver* (1900) 37 Ore. 514.

TAXATION—VALUE OF INTANGIBLE PROPERTY OF PART OF A SYSTEM.—A ferry company, operating between two states, owned the tracks and the entire stock of two short railroads, connecting the ferry at either end with other railroads, and operated the whole as one system. A tax was assessed against the ferry company in respect to one of the railroads computing the value of the intangible property of the latter as that proportion of the intangible property of the entire system that its tangible property bore to the tangible property of the system. *Held*, the tax was valid. *State* v. *Wiggins Ferry Co.* (Mo. 1907) 106 S. W. 1005.

Similar methods of determining the value of the intangible property of interstate carriers within a particular state have been determined to be valid. *Cleveland etc. Ry. Co.* v. *Backus* (1893) 154 U. S. 439; 7 COLUMBIA LAW REVIEW 529. As this is merely a method of determining the value of a given part of the system, and lays no tax on any other parts, *West. Un. Tel. Co.* v. *Gottlieb* (1903) 190 U. S. 412; *Adams Express Co.* v. *Ohio* (1897) 166 U. S. 185, the same method would seem equally applicable to any part of a system, although not bounded by State lines, and even if owned by an entirely distinct corporation. The method is undoubtedly inaccurate and has heretofore been applied only to homogeneous lines of transportation. *Erie R. R. Co.* v. *Pennsylvania* (1895) 158 U. S. 431; *Pullman Car Co.* v. *Pennsylvania* (1891) 141 U. S. 18. But the reasoning which has upheld it in such cases would uphold it also where, as in the principal case, the system is made up of different forms of transportation.

TORTS—DEATH BY WRONGFUL ACT—SUIT BY FOREIGN PERSONAL REPRESENTATIVE.—The plaintiff was appointed administratrix in Connecticut where her intestate was killed. She sued in Rhode Island upon the cause of action that accrued under the Connecticut wrongful death statute. *Held*, the action was maintainable since she sued as trustee for the Connecticut beneficiaries. *Conner* v. *N. Y. etc. Ry. Co.* (R. I. 1908) 68 Atl. 481. See NOTES, p. 311.

TORTS—SURVIVAL OF ACTION FOR PERSONAL INJURY—DEATH BY WRONGFUL ACT.—The plaintiff's intestate died from injuries pending an action to recover damages therefor. The plaintiff continued the action recovering under a survival statute; and subsequently sued under a wrongful death statute. *Held*, the latter action was not barred by recovery in the former. *The Mahoning etc. Ry. Co.* v. *Van Alstine, Adm.* (1908) 77 Oh. St. 104.

Where both a survival and a wrongful death statute are in force, two views are taken as to their effect. Some authorities hold that as there is but one wrongful act, *Holton* v. *Daley, Adm.* (1882) 106 Ill. 131, the statutes

are *in pari materia, Lubrano, Adm.* v. *Atlantic Mills* (1895) 19 R. I. 129, the survival statute applying where the death did not result from the injuries sued on; *Martin, Ex.* v. *Ry. Co.* (1897) 58 Kan. 475; others, followed in the principal case, maintain correctly that two actions will lie, since the wrongful act infringed the rights both of the deceased and of the statutory beneficiaries. *Brown, Adm.* v. *Ry. Co.* (1889) 102 Wis. 137; *Davis, Adm.* v. *Ry.* (1890) 53 Ark. 117. The criticism that this rule is "not entirely consistent," 15 Har. L. Rev. 854, with the holding that under a wrongful death statute a claim existing at the deceased's death must be shown, *Hecht* v. *Ry. Co.* (1892) 132 Ind. 507, is unwarranted, cf. *Littlewood, Adm.* v. *Mayor etc. N. Y.* (1882) 89 N. Y. 24, since the latter is merely a statutory limitation as to the conditions under which the new cause of action is to arise. 7 COLUMBIA LAW REVIEW 553; 5 id. 545; cf. 9 & 10 Vict. c. 93; N. Y. Code Civ. Pro. § 1902.

TRUSTS—ACCUMULATIONS—VALIDITY OF DIRECTION OVER—SOLE BENEFIT.—A will provided that a share of the testator's estate should be held in trust and the income therefrom accumulated until the majority of the beneficiary, when the accumulated fund should be added to the principal trust fund and the trustees should pay the beneficiary $15,000 per annum until he reached the age of 25 years. The principal sum was then directed to be paid to him, less a stipulated amount to be held in trust for the life of the beneficiary with certain remainders over. *Held*, that the directions for accumulation of income during minority were invalid, so far as the accumulation was sought to be made a part of the fund to be held in trust after the beneficiary became of age, and that on majority he was entitled to such accumulation. *Cochrane* v. *Alexandre* (1907) 107 N. Y. Supp. 587. See NOTES, p. 298.

TRUSTS—POWER IN TRUST—SUSPENSION OF ALIENATION.—The testator provided for a trust of his residuary estate until the majority of his youngest child; a fund of thirty thousand dollars was then to be set apart for the widow for life; the residue to be divided into equal funds for his widow and children for their respective lives; and at the widow's death the corpus of the thirty thousand dollar fund was to be distributed among the remaining trust funds. The widow died before the youngest child came of age. *Held*, there was intestacy as to thirty thousand dollars. *Morton* v. *Sands Trust Co.* (1907) 107 N. Y. Supp. 698.

In the case of personal property the mere possibility of the suspension of the absolute power of alienation beyond two lives in being violates Personal Property Law, Art. 1, section 2. *Herzog* v. *Title etc. Co.* (1903) 177 N. Y. 86; *Haynes* v. *Sherman* (1889) 117 N. Y. 433. If the thirty thousand dollars had been allotted to the widow, and later passed to the children, there would clearly have been an illegal suspension; and so long as the testator gave an interest by his will which might thus operate, that the specific fund was not separated at his death would seem immaterial. *Kirk* v. *Kirk* (1891) 12 N. Y. Supp. 326, 329. An imperative power in trust as to a fund may as effectually suspend the power of alienation as the existence of a trust itself. *Dana* v. *Murray* (1890) 122 N. Y. 604. That the power in the principal case as to the setting aside of the thirty thousand dollars was conditional would seem only to diminish the degree of possibility. There was, then, a possibility of an unlawful suspension of the power of alienation, and hence an intestacy, as to an undivided thirty thousand dollars of the residuary fund.

WATERS AND WATER COURSES—POLLUTION OF PERCOLATING WATER.—The plaintiff's well was polluted by percolation from the body of an animal buried on the defendant's property. *Held*, the defendant was not liable in the absence of negligence. *Long* v. *Louisville & N. Ry. Co.* (Ky. 1908) 107 S. W. 203.

The right to the purity of water coming to one's land, whether under or above ground, is a natural right. Goddard, Easements, 5th Ed., 96; *Wood*

v. *Waud* (1849) 3 Exch. 748; *Ballard* v. *Tomlinson* (1885) L. R. 29 Ch. D. 115. This right cannot be assimilated to the right to the water itself, the same jurisdictions which allow the flow to be interrupted by an upper owner not allowing him to pollute it, *Hodgkinson* v. *Ennor* (1863) 4 B. & S. 229; *Ballard* v. *Tomlinson, supra,* and this in spite of the fact that the plaintiff has no property in the water when it is polluted. *Womersley* v. *Church* (1867) 17 L. T. N. S. 190; *Whaley* v. *Laing* (1857) 2 Hurl. & Nor. 476; *Ballard* v. *Tomlinson, supra.* Some cases hold, with the principal case, that, in the absence of negligence, pollution is *damnum absque injuria. Woodman* v. *Aborn* (1853) 35 Me. 271; *Dillon* v. *Acme Oil Co.* (1888) 49 Hun 565. Other cases deny liability if the pollution arises from acts done in a "suitable place." *Upjohn* v. *Board of Health* (1881) 46 Mich. 542; *Brown* v. *Illius* (1857) 25 Conn. 583. The weight of authority, however, is that the land owner must exclude filth entirely from his neighbor's land, any neglect to do so being actionable, *Tenant* v. *Goldwin* (1704) 1 Salk. 360; *Ballard* v. *Tomlinson, supra; Haugh's Appeal* (1883) 102 Pa. St. 42; *Perrine* v. *Taylor* (1887) 43 N. J. Eq. 128, and the nuisance may be enjoined or abated if the injury is substantial. *Iliff* v. *School Directors* (1892) 45 Ill. App. 419; *Lowe* v. *Prospect Ass'n* (1899) 58 Neb. 94; *Columbus Gas Co.* v. *Freeland* (1861) 12 O. St. 393, 400. The principal case is unsound in assimilating pollution to the appropriation of percolating water and so requiring negligence as a basis for liability, being supported neither by Kentucky decisions, *Kinnaird* v. *Standard Oil Co.* (1890) 89 Ky. 468, nor by the weight of authority.

WILLS—CONDITIONS—MARRIAGE.—A will gave the testator's property to his wife absolutely; in case of her marriage so much as had not been consumed to vest in his children. With intent to defeat the will she conveyed to one who reconveyed to her, and then married her. *Held,* on the marriage the property vested in the children. *Littler* v. *Dickman* (Tex. 1908) 106 S. W. 1137.

Under the common law construction of devises, if property, real or personal, was left to a wife with an estate over in case of her marriage, it was generally considered a life estate, whether given for her own benefit during widowhood, *Boyd* v. *Strahan* (1865) 36 Ill. 357; *Green* v. *Hewitt* (1889) 97 Ill. 113; *Long* v. *Paul* (1889) 127 Pa. St. 456, or whether full power of disposal for that period was expressly given, *Douglas* v. *Sharp* (1889) 52 Ark. 113; *Brant* v. *Virginia etc. Co.* (1876) 93 U. S. 326; *Giles* v. *Little* (1881) 104 U. S. 291, this latter as usual being considered limited by the estate. *Patty* v. *Goolsby* (1888) 51 Ark. 61; *Douglas* v. *Sharp, supra; Brant* v. *Virginia etc. Co., supra; Giles* v. *Little, supra.* Some jurisdictions hold that such a devise conveys a fee simple, defeasible on the marriage of the widow, *Swope* v. *Swope* (Md. 1847) 5 Gill 225, and others a life estate with absolute power of disposal during widowhood. *Levengood* v. *Hoople* (1889) 124 Ind. 27; *Morse* v. *Cross* (Ky. 1856) 17 B. Mon. 735. Statutes that exist in most of the states making the presumption that an estate devised is a fee simple unless an intention to convey a less estate clearly appears have been widely construed as changing this kind of devise from that of a life estate on a conditional limitation to a fee simple defeasible. *Little* v. *Giles* (1889) 25 Neb. 313; *Redding* v. *Rice* (1893) 171 Pa. St. 301; *Roberts* v. *Lewis* (1893) 153 U. S. 367 (overruling *Giles* v. *Little, supra,* and approving *Little* v. *Giles, supra*). On principle, the words "during widowhood," or "so long as she remains unmarried," coupled with a devise over or other limitation seem to show sufficiently the intent to limit the estate to the widow's natural life, even under such a statute. *Nash* v. *Simpson* (1886) 78 Me. 142; *Giles* v. *Little, supra.* If the construction be adopted that there was full power to alienate, with a limitation over by way of executory devise, the latter would generally be considered void, *McClellan* v. *Larcher* (1889) 45 N. J. Eq. 17; *Howard* v. *Carusi* (1884) 109 U. S. 725; *Van Horne* v. *Campbell* (1885) 100 N. Y. 287, but in Texas this doctrine does not prevail. *Lockbridge* v. *McCommon* (1896) 90 Tex. 234; *Laval* v. *Staffel* (1885) 64 Tex. 370.

BOOK REVIEWS.

CHARLES S. BULKLEY, *Editor-in-Charge.*

THE PHILOSOPHY OF PROOF: IN ITS RELATION TO THE ENGLISH LAW OF JUDICIAL EVIDENCE. By J. R. GULSON. London: George Routledge & Sons, Limited. New York: E. P. Dutton & Co. 1905. pp. xiv, 496.

Though this book has been long in finding its way across the Atlantic to the American reviewer's table, it is not one to be lightly dismissed on that account. Both for its unusual merits and its too obvious defects it demands consideration. In both ways it serves a useful purpose—instructing and stimulating the reader by its profound discussion of the logical basis of our system of evidence, while exhibiting to him the dangers which lurk in the abstract and theoretical treatment of the most practical and concrete of sciences.

Let it be said at once that the author has not committed the capital error—which the title and the earlier half of the book threaten—of attempting to rewrite the law of evidence from the logician's point of view. His work is an examination of the English law of evidence as set forth in the pages of Taylor, Best and Stephen, but it is a criticism, not an exposition. For this reason his occasional lapses into error as to the actual state of the law, his neglect of its history, his complete ignoring of the American law, even his lack of acquaintance with the English cases are excusable. He writes not as a lawyer, nor yet as a student of jurisprudence, but as a philosopher seeking to ascertain the extent to which the practice of the courts in the admission and rejection of evidence conforms to the canons of the science of reasoning.

It must be conceded that no part of our law stands more in need of the refreshment that comes from turning fresh streams of thought upon it, as none has grown to its present great stature in more haphazard fashion than the body of rules regulating the admission of evidence. The various branches of our substantive law have developed under the influence of great considerations of private and social justice or of public policy; even the rules of pleading have been redeemed from an arid technicality and infused with the life that flows from the prevailing conceptions of remedial justice. But no fixed star has guided the course of the law of evidence. Shaped from generation to generation by the exigencies of the moment, it stands to-day a monument to the judicial distrust of the jury as an instrument of justice.

That with such a history the law of evidence should to-day constitute a veritable system and be capable of philosophical treatment is no mean tribute to the corporate wisdom of the English and American judiciary and vindicates the faith that there is a divinity that shapes the ends of justice. Thus conceived, and quite apart from its extraordinary historical interest, the law of evidence presents one of the most fascinating problems in the whole range of jurisprudence; and it is not a little remarkable that it should have found so few to deal with it from the philosophical point of view. With the exception of Bentham's ill-tempered and doctrinaire treat-

ment and the thoughtful exposition of Best, it can almost be said to have had no literature of this sort prior to the appearance of the work under review.

It can safely be said of Mr. Gulson's volume that it is an extremely interesting and valuable contribution to the scientific study of the subject. It is acute, well-reasoned and, within the narrow limits above indicated, thoroughly well-informed. Whether the author is a lawyer or not, we are not informed—his avoidance of cases would seem to indicate the contrary—but he displays a firm grasp of the principles of the law as expounded by his English authorities and certainly no lawyer who has to deal critically with the rules of evidence can afford to ignore his discussion. It is obvious that a critical intelligence, dealing fearlessly and without professional bias with such a system as that of evidence, will find plenty of fallacies to expose, and this has been our author's happy lot. He has, it may be hoped, definitely disposed of the notion that documents constitute an independent and distinctive kind of evidence by bringing them and their contents, when produced in court, into the category of "real evidence" (270, 342), and he has robbed this category of the ambiguity with which Bentham, Best and other writers had invested it by classing as real evidence every fact which is directly manifested to the senses of the tribunal (pp. 194, 275, 280, etc.). Indeed, his whole treatment of the subject of writings (pp. 338-387) is illuminating and convincing. He is at his best, however, in the more formal and rigorous parts of his work, as in his discussion of the nature of an inference and of the effect of the coincidence of evidentiary facts and in his analysis of direct and circumstantial evidence. It is in this searching analysis of the reasoning processes to which evidence appeals and by which its relevancy and probative force are determined, rather than in its detailed analysis and criticism of particular doctrines, that the student will find the book of most value. It will not be easy reading, but it will be worth all the labor it costs to master it.

The faults of the book, to which even its conspicuous merits cannot blind us, are neither few nor insignificant. Its very form and arrangement provoke criticism. Part I, dealing with "Natural Evidence," in twenty-two chapters, is largely duplicated in a Part II of twenty-six chapters on "Judicial Evidence." As the first part involves a continuous criticism of the doctrines of Bentham, Best and other writers on judicial evidence and does in fact deal mainly with such evidence, it is hard to see why it was thought necessary or desirable, at the expense of endless repetition, to relegate the more detailed examination and criticism of the doctrines of judicial evidence to a separate division of the work. The author's adoption of the misleading maxim, "Hearsay is not evidence"—which means only that it is not *admissible* evidence—is matched by his acceptance of Stephen's confusing definition of "relevancy," which identifies relevancy with admissibility and so destroys its value as an independent test of admissibility. From this confusion of terms arises the awkward grouping of certain facts as "facts deemed to be relevant," which has reference not to facts logically irrelevant, to which the law attaches a mysterious probative quality, but to facts really relevant and tending logically to establish the *factum probandum,* but, for one reason or another, excepted from the rule exclud-

ing hearsay evidence. The author's contention that evidence of reputation is hearsay (p. 305) seems to be due to an uncritical failure to discriminate between the fact testified to and the inference to which it leads. The knowledge of the witness—that the community in which X resides has such an opinion of him, speaks thus of him—is immediate and direct, and it is to this and this only that he testifies; the rest is inference for the jury.

There is a curious lack of historical perspective in the statement (p. 288) that the judges "have arrogated to themselves the right of deciding those issues of fact which turn only upon direct real evidence," *i. e.*, upon writings submitted to the court, as well as in the implication (p. 291) that it is an unwarranted stretch of judicial power to pass upon any evidence not "real." These are errors which even a slight acquaintance with the writings of Brunner or of Prof. Thayer would have obviated. The treatment of the topics of Burden of Proof and Presumptions, which would lend themselves admirably to the author's method, is perfunctory and unsatisfactory. It is to be regretted that in dealing with presumptions he did not take the obvious step of taking irrebuttable or conclusive presumptions out of that doubtful category and of referring them to the several branches of the substantive law to which they belong.

There are other errors in the book, but enough has been said to show that, with all its merits, the work is not an infallible guide. But the reviewer has failed in his aim if he has not left in the minds of his readers the conviction that, with all its faults, the book is one which the serious student of the law of evidence cannot afford to ignore.

A Treatise on the Law of Naturalization of the United States. By Frederick Van Dyne, LL.M. Washington: Frederick Van Dyne. 1907. pp. xviii, 527. The Lawyers' Co-operative Publishing Co., Selling Agents. Rochester, N. Y.

The great tide of immigration which has been pouring upon our shores in recent years, and one or two events which have occurred in this country, have directed attention to this subject and to the kindred one of naturalization in a manner to arouse public interest more keenly than for a long time. From 1828 till 1903 there were no changes of special moment in the statutes governing naturalization, but since that time the legislation has been considerable, and in some respects marks a radical departure from that which had preceded. It was therefore timely that there should be a work devoted to this subject, which should embody the present condition of the law, both as to the successive statutory enactments, and the construction placed upon them, and this is now furnished in the volume entitled "Naturalization in the United States" by Frederick Van Dyne, and is a fitting supplement to the earlier volume by the same author, "Citizenship of the United States."

There are two distinct view-points in dealing with the subject of naturalization, one that of the Courts, which are asked to admit an alien to citizenship or to pass upon the validity of the proceeding or order by which he was admitted, and the other that of the executive or administrative branch of the government. The former is controlled entirely by the acts of Congress and the interpretation placed upon those acts by various

courts; in the other aspect international law plays an important and often a controlling part. The result is inevitable that a different rule, or a different application of the rule, is followed in the administrative from that which obtains in the judicial branch of the government. Any work therefore which deals with such a subject must deal with it in the dual aspect. This condition Mr. Van Dyne has recognized in his work and emphasizes it more than once, but when he comes to the citation of authorities, the particular aspect upon which a given citation bears is not always as clearly pointed out as was to have been desired.

The volume is specially full in references to the rulings of the various departments of the government, and the decisions of special commissions, and in some cases the quotations from these are very full. This is especially noticeable in connection with the case of *Ruiz* v. *United States*, decided by the Spanish Claims Commission in 1905, and from the opinion in which he quotes to the extent of forty-four pages. For such liberal citation the main justification is to be found in the fact that the decisions of Commissions of this character, as well as rulings by the administrative departments, are often inaccessible to a very large number of lawyers and to our ministers and consuls when at their several posts of duty. But the prominence which is given to this aspect of the subject makes the present volume of greater value to those practising before the government departments and to our foreign representatives than to the lawyer whose practice is in the Courts of one of the States.

The great confusion which has long existed and which to some extent still exists where the question involved is the effect of the naturalization upon dependents, such as wife and children, of the individual naturalized, is brought out in bold relief, but to assume that the recent legislation has removed all possibility of doubt and question seems going further than is warranted when the cases and rulings quoted by the author are carefully examined. As a rule Mr. Van Dyne contents himself with quoting from recorded decisions and carefully refrains from any expression of opinion with regard to matters for which he can cite no authority. This is of course a safe rule to follow, and yet at times the reader naturally wishes that the author had from all his study of the subject been a little bolder. As an illustration of what is meant: there is quite a discussion of the persons who are capable of naturalization, in which the various races are treated of in connection with the acts of Congress and adjudications of the Courts. But take the case of an alien who under our immigration laws ought not to have been permitted to land in this country, but has managed to successfully elude the vigilance of the immigration officials. His very act of entry is a violation of our laws, his first step upon our soil is as a lawbreaker. Is such an one a proper subject or not for naturalization? This question has not yet been passed upon by the Courts, and an expression of opinion on it would have been both pertinent and of value.

The chapter on expatriation, while short, is of great value for the reason that there is no phase of the question with regard to which so much misapprehension exists, even among those usually well informed on the subject, but it would have been improved by the addition to it of the recent German statute on the subject, which affects the status of many

Germans now residing in this country, and who are in profound ignorance of the fact that they have completely expatriated themselves.

The various forms given and which are in strict accordance with the provisions of the act of 1906 will give the book peculiar value to the Clerks of the various Courts which exercise the power of naturalizing foreigners, while the statutes, treaties, departmental regulations and list of Courts which can now properly exercise the power to naturalize will be found a most convenient compendium.

In one respect the legislation thus far enacted is incomplete, and an effective remedy difficult to devise, but attention is called to it in the hope that Mr. Van Dyne from his study of the subject may be able to suggest a practicable solution. Take the case of a man who has been naturalized in one of the State Courts and thereafter moves to a different State where it is discovered that his naturalization was fraudulently obtained. The statutes provide that the District Attorney of the domicil of the individual may proceed for the cancellation of his naturalization, by the giving of actual or constructive notice to the person to be affected, and that this may be followed up and consummated in the jurisdiction of the domicil by an order of cancellation. But that does not wipe out the record of the naturalization, and the Court which may enter an order of cancellation has no jurisdiction whatever over the first tribunal and no power to compel any alteration of its records. There may thus be in existence at the same time a record of naturalization in one jurisdiction and of the cancellation of it in another, and these may continue to coexist. Such a condition is of course an anomaly, and yet so long as state and federal tribunals exist independent of one another, and the one not subject to the orders and decrees of the other, it would seem that this condition must continue.

An Essay on Professional Ethics. By Hon. George Sharswood, LL.D. Fifth Edition. Reprinted for the American Bar Association. Philadelphia: T. & J. W. Johnson Co. 1907. pp. 196.

This edition of a legal classic is published in connection with the project now before the American Bar Association of formulating a code of legal ethics.

The work is founded on a course of lectures delivered by Chief Justice Sharswood, more than fifty years ago, while a Professor in the Law Department of the University of Pennsylvania. The subject of legal ethics is always of fresh interest to the class whom it most concerns—that of law students. Professor Sharswood discussed it in his lecture room with more fulness than had as yet attended its treatment in any English or American university, and after the lapse of half a century this book is still the authority to which appeal is generally taken, where lawyers differ as to what in any case may be the proper rule of professional conduct. In North Carolina, not otherwise famous for strictness in its requirements for admission to the bar, every applicant is required to read it.

It may perhaps be regretted that the author did not confine himself more closely to the particular topic in hand. When with the observation that the world is too much governed, he expresses his dissent (p. 23) from

the view of Kent that there was no danger of putting too many restrictions upon legislation, he showed himself less wise in forecast than the great Chancellor. The Constitutions of our newer States—the last not least—are winesses against him.

A modern writer would be less ready than was Professor Sharswood to fortify his positions by appeals to the Bible. No one is left in doubt (see pp. 13, 114) that he implicitly respects its authority and is an earnest believer in the Christian faith. His classes, we may be certain, suffered no harm from thus coming in close contact with one to whom religion was a vital thing.

The author well understood the value of incident and anecdote to light up a discussion, liable in unskilful hands to become a wearisome statement of moral commonplaces. The conduct of Mr. Phillips in the Courvoiser trial (p. 103); the blunder of Hardinge in declaring the American Colonies represented in Parliament by the members from Kent, because the tenure of those holding lands under the Colonial charters was as of the manor of Greenwich (p. 134); and Brougham's mistatement of an advocate's duty in the case of Queen Caroline (p. 86); are brought to the reader's attention in a manner that compels their recollection.

The propriety of contracting with clients for contingent fees or a percentage of the amount received has never been treated more lucidly, in respect to its natural effect on the lawyer's conduct of the case (pp. 153-164).

That there should be frequent references to Pennsylvania decisions and Pennsylvania statutes, and the opinions of leading members of the profession in Pennsylvania was to be expected in lectures by a Pennsylvania lawyer to students who were mostly his fellow citizens and preparing for its bar. The illustrations which they furnish, however, are always apt; and every man speaks best of what he knows best.

General Thomas H. Hubbard, of New York (who, a few years since, founded a lectureship on Legal Ethics in the Albany Law School), has met the expense of sending a copy of this treatise to each member of the American Bar Association. It will be money well laid out; for no lawyer can read it without being inspired anew to do what is in him to maintain, against all temptations, the honor of his profession.

THE SEIGNIORIAL SYSTEM IN CANADA. BY WILLIAM BENNETT MUNRO, Ph.D. New York: Longmans, Green & Co. 1907. pp. xiii, 296.

Professor Munro has here presented a most interesting and valuable history of a legal institution in such attractive form as to appeal to a much wider public than the small group of scholars whose specialty is the history of legal institutions. The book is both scholarly and entertaining and will without doubt be regarded as the authoritative work upon the history of this belated feudal institution after it had been transplanted to the New World. After a brief sketch of the feudal system as it had existed in France, the 'European Background,' Professor Munro takes up the consideration of the early Canadian grants by which this feudal form of land tenure was introduced in the French colony. The grants were made at first by the trading companies for the sake of trade and not of settlement;

the slowness with which the settlement of New France proceeded very early attracted the attention of the home government and the grants were thenceforth made by the Crown. In fact, one derives from the book a very strong impression of the kindly paternalism of the Grand Monarch and the constant effort made to extend his settlements and care for the welfare of the settlers. This attitude of France toward her colonies is well known, but Professor Munro makes it particularly clear in his discussion of the banal rights of the seignior; he shows how the chief of these rights, that of the banal mill, was, at least in the early days, a burden rather than a source of profit to the seignior; neither the banal rights, the corvées nor the dues in money or kind are regarded by the author as particularly oppressive, and the position of the habitant is shown to have been far superior to that of the peasant in France.

The relation of the Church to the seignior and to the system is discussed in one of the very interesting chapters; the relations of Church and State in Canada were the reverse of those usually to be found; there it was support of the State by the Church rather than Church by State and many seigniories were granted to religious bodies. It is remarkable, however, that the "clerical officials and orders manifested no desire to exercise judicial authority."

The later history of the system under British rule until its final disappearance in 1854 is not entirely to the credit of the conquerors. Its bad features received an increased emphasis from the strictly commercial attitude taken by the English seigniors who supplanted the French in large part after 1763.

A Bibliographical Appendix, which is really a critical essay on the sources; an Alphabetical List of Printed Materials and an Index are valuable to the student and add materially to the worth of the book.

REVIEWS TO FOLLOW:

MARKETABLE TITLE TO REAL ESTATE, BEING ALSO A TREATISE ON THE RIGHTS AND REMEDIES OF VENDORS AND PURCHASERS OF DEFECTIVE TITLES (AS BETWEEN THEMSELVES). Second Edition. By CHAPMAN W. MAUPIN. New York: Baker, Voorhis & Co. 1907. pp. lxxvi, 910.

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A SUPPLEMENT TO A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW. By JOHN HENRY WIGMORE. Boston: Little, Brown & Co. 1908. pp. xiii, 459.

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FEDERAL USURPATION. By FRANKLIN PIERCE. New York: D. Appleton & Co. 1908. pp. xx, 437.

A TREATISE ON EQUITY JURISPRUDENCE. By JOHN NORTON POMEROY. STUDENTS' EDITION. By JOHN NORTON POMEROY, Jr. San Francisco: Bancroft-Whitney Co. 1907. pp. xvi, 1048.

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THE EVOLUTION OF THE ENGLISH JOINT STOCK LIMITED TRADING COMPANY.

England has for many centuries been a trading community, which has recognized the advantages of a number of persons working together for the furtherance of a commercial adventure or undertaking. For many years Englishmen have been called a "Nation of Shopkeepers," but they were all that and more long before the epithet was applied.

An American has done more than any Britisher to tell us the story of the Gild Merchant and the craft gilds. He says that the

"words 'so that no one who is not of the Gild may trade in the said town except with the consent of the burgesses,' which frequently accompanied the grant of a Gild Merchant, expressed the essence of this institution. It was clearly a concession of the exclusive right of trading within the borough. The Gild was the department of town administration whose duty it was to maintain and regulate the trade monopoly. This was the *raison d'être* of the Gild Merchant of the twelfth and thirteenth centuries; but the privilege was often construed to imply broader functions—the general regulation of trade and industry."[1]

As to the craft gilds he says:

"During and anterior to the fourteenth century it is probable that a charter of the King was necessary for the founding of a fraternity, but in the succeeding centuries we meet with numerous examples of the establishment and incorporation of craft gilds or trading companies by the town authorities. * * * During the sixteenth and seventeenth centuries the Crown sometimes granted to a town the power to create or divide itself into fraternities or mysteries."[2]

[1] Gross, Gild Merchant, Vol. I, p. 43. [2] Ib. p. 113.

These early trading or trade-regulated bodies had, probably, no joint stock or capital, whether transferable or not by the members. Moreover, they were institutions mostly, if not entirely, for trading at home and not abroad. This was not enough for a people with a sprinkling of Viking blood in their veins.

If we are shopkeepers, we are also a sea-faring community, and towards the close of the sixteenth century some of our navigators might have been well described as "circumnavigating trading pirates." The early history of the East India Company is an apt illustration, and its promoters, like those of other companies, availed themselves of what was then, practically, the only way of sound commercial trading in foreign parts under the English flag—namely, that of a corporation established by Royal Charter. Queen Elizabeth and the three or four English sovereigns who succeeded her were quite liberal to themselves in their ideas as to what could be given by a Royal Charter, and what could be so given was not clearly defined, at all events in Elizabeth's time. But some points were quite clear.

I.—Trading Corporations under Prerogative Royal Charters.

The Crown had at common law, and still has, the power of incorporating by charter any number of persons assenting to be incorporated. Early English traders took advantage of this power, having no Companies Acts to register under, and being indisposed to spend money in obtaining Acts of Parliament. The merchants, or adventurers, or pirates were quite willing to accept the conditions of a Royal Charter, and its consequences. They got their corporate name, "the Knot" of their constitution. The corporation's founders were its god-fathers, but the sovereign baptized it. It could sue and be sued by its corporate name, and under and in that name it had perpetual succession, with the power to hold property, a common seal, and the power to make by-laws and so on. Later, it was held that it was not in the power of the Crown to give the corporators any right in the way of monopolies, or "so to incorporate those persons as to make them liable to any extent to the debts of the corporation." [3]

It is stated also that the sovereign could not grant a charter of incorporation for a limited time, but several sovereigns had different opinions on this point. In 1825 the Act 6 Geo. IV, c. 91 (the Act which repealed the Bubble Act) provided that in any charter

[3] Per Lindley, L. J., in Elve *v.* Boyton (1891) 1 Ch. 501.

thereafter to be granted by the sovereign "for the incorporation of any company or body of persons" it should be "lawful in and by such charter to declare and provide that the members of such corporation" should be individually liable, in their persons and property, for the debts, contracts and engagements of such corporation, to such extent, and subject to such regulations and restrictions as "the sovereign might deem fit and proper, and as" should "be declared and limited in and by such charter," and that the members should thereby be rendered so liable.

This provision was repealed in 1837 by sec. 2 of the Act 7 Will. IV and 1 Vict., c. 73, and sec. 29 of the same Act enabled the Crown in any charter of incorporation to be thereafter granted to limit the duration thereof for any period whatsoever,

"and also in any charter of incorporation (whether in perpetuity or for any term or period) either by reference to this Act, or otherwise, to make the corporation thus formed, and the officers and members thereof, subject to all of the provisions, liabilities and directions hereinbefore authorized to be imposed on or required from any unincorporated company or body, or its officers or members, and also to confer on such corporation or its members or officers all the powers or privileges hereinbefore authorized to be conferred on any unincorporated company or body, or its officers or members."

These powers and provisions are indicated under another heading.

By 47 and 48 Vict., c. 56 (1884), sec. 29 of the Act of 1837 is to be "construed as from the date thereof to have authorized and to authorize Her Late Majesty by charter or by warrant or other writing under her sign-manual" to extend or renew any charter granted by Her Late Majesty or any privileges thereunder. Persons who wished to trade together were quite willing to be incorporated by Royal Charter although it had been laid down by lawyers that the corporation thereby created had "no soul"; that it was only *in abstracto,* and rested only in "intendment and consideration of law," and were perhaps consoled by the confident averment that their corporation was "invisible and immortal," and was not "subject to the imbecilities of the mind."

Charters obtained from the Crown by false and fraudulent statements might and may be annulled by *scire facias;* or they may be surrendered, the corporation ceasing to exist when the surrender has been accepted, and has been enrolled in the proper office.[4]

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[4] Lindley on Companies, 138.

Reference has already been made to the views which sovereigns took as to their right to grant monopolies. One instance of how they carried that view into practice is that of the old East India Company. The first Royal Charter of that company was granted in 1600.

"Until 1610 it had been a common practice of the Crown, by charter or letters patent, to grant to subjects an exclusive right to sell, buy, make, work or use anything within the realm (Bac. Abr., tit. Monopoly). But * * * such monopolies were held void by the Courts (*Case of Monopolies* (1601) 11 Co. Rep. 84b)." [5]

The East India Company's charter is said to have

"contained nothing which remarkably distinguished it from the other charters of incorporation so commonly in that age bestowed upon trading associations. It constituted the adventurers a body politic and corporate by the name of the 'Governor and Company of Merchants of London, trading to the East Indies.'"

Subject to certain vested interests it granted to the company the *exclusive privilege of trading to the East Indies.* The charter was

"granted for a period of fifteen years, but under condition that, if not found to be advantageous to the country, it might be annulled at any time under a notice of two years; if advantageous, it might, if desired by the company, be renewed for fifteen years." [6]

The Charter therefore apparently infringed both the rule as to monopolies and the rule against creating a corporation for a limited time.

Yet in 1609 the East India Company obtained a renewal of its charter conferring all its preceding privileges and constituting it a body corporate forever, subject to a provision that on experience of injury to the nation its exclusive privileges should, after three years' notice, cease and expire.[7] This was only fourteen years before the Statute of Monopolies, passed in 1623, which, while declaring that while all monopolies "are altogether contrary to the laws of this realm and so are and shall be utterly void and of none effect, and in no wise to be put in use or execution," by sec. 9 exempted from the operation of the Act charters granted to "any companies, or societies of merchants within this realm created for the maintenance, enlargement or ordering of any trade or merchandise."

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[5] Encyclopædia of English Law.

[6] Mill's History of British India (4th ed.) Vol. I, p. 24.

[7] Ib., p. 28.

The East India Company was originally what was called a "regulated company," not a joint stock company.

"The very last day of the 16th century having given birth and form to the first East India Company, the members thereof immediately raised the sum of £72,000, though not in one joint-stock or common capital, as in succeeding times, there having been no joint-stock in this company till about 1612 or 1613." [8]

The company was managed by a chairman and a committee of directorate of twenty-five. Though the list of subscribers had been readily filled up,

"the calls of the committee for the payment of installments were very imperfectly obeyed. Even when the charter was obtained, it was either understood to confer no power of compelling payment, or the directors were afraid to make use of it. Instead of exacting the stipulated sums, and trading upon the terms of a joint-stock company, the subscribers who had paid were invited to take upon themselves the expense of the voyage, and, as they sustained the whole risk, to reap the whole of the profit." [9]

Up to about 1613 each adventure was

"the property of a certain number of individuals, who contributed to it as they pleased, and managed it for their account, subject only to the general regulations of the company." [10]

The joint-stock subscriptions of the East India Company will be referred to later on.

The company had some dealings with Cromwell in relation to joint-stock, which will be noticed later on, and on April 3d, 1661, Charles II granted a new charter to the company, confirming its ancient privileges and giving it authority to make peace and war with non-Christians; his father had given it martial law over its servants.

In 1684, in the case of the *Honorable East India Company* v. *Sandys*,[11] the grant to the company of the exclusive right of trading with India was contested but upheld. The principal ground for this decision was that the sole privilege of trading was in foreign parts. Jefferies, C. J., in the course of his judgment, says:

"I conceive this charter of sole trade to the Indies, excluding others, is neither opposed by the common law or prohibited by an Act of Parliament; but is supported by both, as will more evidently appear by the practice and constant usage in all times.

[8] Anderson's History of Commerce, Vol. I, p. 451.

[9] Mill's History of British India (4th ed.) Vol. I, pp. 24, 25.

[10] Ib., p. 30. [11] 10 State Trials 371

* * * And it is not denied that if the King should proclaim a war with the Indians, that then it would be a prohibition to all his subjects to have any commerce with them. * * * So that surely this charter, with these restrictions, is much better than total exclusion; and therefore foreign trade is not like our home trade, to which the word monopolies is properly applicable; for that cannot be totally excluded for any time, though never so small, by any act of prerogative."

The long report of this case and other authorities show that the Crown had granted several other charters giving exclusive license to trade in particular foreign countries. "The public in general," says Mr. Mill,[12] "at last disputed the power of a Royal Charter *unsupported by Parliamentary sanction,* to limit the rights of one part of the people in favor of another, and to debar all but the East India Company from the commerce of India."

In 1690 a committee of the House of Commons resolved that a new company should be established by Act of Parliament, but that the present company should trade exclusively until the new company was established, and in 1691 the House itself asked the King to dissolve the company and incorporate a new one. William III referred the matter to his Privy Council, and in 1693 gave the old company a new Royal Charter continuing its exclusive privileges for twenty-one years.[13] Some of the later history of the East India Company may be referred to under subsequent heads.

II.—Trading Companies Under Royal Charters Granted in Pursuance of Special Statutory Authority.

The prerogative charter of William III to the East India Company did not settle matters even for twenty-one years. The House of Commons voted "that it was the right of all Englishmen to trade to the East Indies, or any part of the world, unless prohibited by Act of Parliament." A rival association of traders to India, or new company, then sprang up, and after some encroachments on the old company's sphere of action a very curious Act of Parliament was obtained in 1698.[14] It is entitled "An Act for raising a sum not exceeding Two Millions upon a Fund for Payment of Annuities after the Rate of Eight Pounds per Centum per Annum, and for Settling the Trade to the East Indies,"

[12] History of British India (4th ed.) Vol. I, p. 129.

[13] Ib., p. 132. [14] The Act 9 and 10 Will. III, c. 44.

and is an early instance of Parliamentary recognition of the advantages of joint-stock trading. Many of the sections relate to the raising of duties on salt, and exported fish, but sec. 48 authorized the King to appoint Commissioners under the Great Seal to take subscriptions for £2,000,000 from persons and "bodies politick or corporate." Sec. 53 enabled sums to be subscribed at a discount for prompt payment. Sec. 56 made it "lawful for His Majesty, by Letters Patent under the Great Seal of England, to incorporate all and every" the above-named subscribers "to be one body politick and corporate by the name of 'The General Society entitled to the Advantages given by an Act of Parliament for advancing a sum not exceeding Two Millions, for the service of the Crown of England,'" and by that name to have perpetual succession and a common seal. Later sections provided that if the money was duly subscribed the subscribers should have exclusive rights of trading to the East Indies, and that such of them as should be willing to join together their shares and interests should be "incorporated so as they may be able to manage their trade (in proportion to their interests) as a company and by a *joint stock*." But provision was made that the old company should have leave to trade to India until 1701.

In pursuance of this Act William III, on September 3, 1698, granted a charter to some of the subscribers of the £2,000,000 on the terms of a "regulated company." Most of the subscribers, however, desired to trade on a joint-stock, and obtained a charter about the same time forming them into a joint-stock company by the name of "The English Company trading to the East Indies." This was what was called the "New East India Company" or "The English Company," the old company being called "The London Company." How the two companies became subsequently one company will be shortly referred to.

Another company created by Royal Charter in pursuance of authority under a special statute was the Bank of England. In 1694 the Act 5 Will. and Mary, c. 20, was passed. Its title is "An Act for Granting to Their Majesties several Rates and Duties upon Tonnage of Ships and Vessels, and upon Beer, Ale, and other Liquors, for securing certain Recompenses and Advantages in the said Act mentioned to such Persons as shall voluntarily advance the sum of Fifteen hundred thousand Pounds towards the carrying on the War against France." The earlier sections

granted the duties and provided the machinery for collecting them. Sec. 19 authorized Their Majesties to appoint Commissioners under the Great Seal to receive voluntary subscriptions towards raising £1,200,000 (part of the £1,500,000 referred to in the title), and an annual sum of £100,000 was annually appropriated to the subscribers. Sec. 20 empowered Their Majesties by letters patent under the Great Seal to incorporate "all and every such subscribers and contributors, their heirs, successors or assigns, to be one body politick and corporate by the name of 'The Governor and Company of the Bank of England,' to have perpetual succession and a common seal" with power to hold lands, etc.—another Parliamentary recognition of joint-stock advantages. Sec. 21 provided that, at any time on twelve months' notice after August 1, 1705, on re-payment of the £1,200,000, the yearly payment to the subscribers of the £100,000 was to cease, "and the said corporation shall absolutely cease and determine." But the Bank has survived to the present day.

The subscriptions for the £1,200,000 were completed in ten days' time, and the Royal Charter in pursuance of the Act was executed on July 27, 1694.[15]

Many statutes relating to the Bank of England have since been passed, and the Bank Act, 1892,[16] sec. 7, enabled Her Late Majesty to grant to the Bank a supplemental charter regulating the internal affairs of the corporation.

Another company created by Royal Charter, in pursuance of a special statute, was the South Sea Company. In 1711, the debts of the navy and other public debts being very large, Harley formed the scheme of raising a fund to pay 6 per cent. interest on them by making certain duties permanent, and by granting a monopoly to the proprietors of this funded debt, and incorporating them for the purpose of such trade.[17]

The Act in the 9 Anne, c. 21, was passed in consequence, and in the early part of it there is a good deal about sovereigns "most gracious," and "of glorious memory," and of "most dutiful and faithful subject," and of the "Blessing of Almighty God." (Promoters have always been adepts in fine language.) Then after making permanent or imposing certain duties, sec. 23 and other sections referred to the "principal or capital stock" of the intended

[15] See Anderson's History of Commerce, Vol. II, p. 206.

[16] 35 and 36 Vict., c. 48. [17] Collyer on Partnership (2nd ed.) 722.

company, and sec. 25 enabled the Queen by letters patent under the Great Seal to incorporate the proprietors of the funded debt as "one body politick or corporate in deed and in name, and by such name as Her Majesty, her heirs or successors shall think fit, and by that name to have perpetual succession and a common seal." Sec. 29 made provision that persons interested in bills or debentures payable out of the navy and other public offices should be admitted into the "joint-stock" of the said company and be and become members thereof, and several subsequent sections also referred to the same "joint-stock." Sec. 36 provided that the charter might direct how and in what manner and proportions the shares in the stock of the intended company should be assignable or transferable. Sec. 46, after reciting that trading to the South Sea and other parts of America within certain limits "cannot so securely and successfully be begun and carried on as by a *Corporation with a Joint-Stock* exclusive of all others," provided that the intended company should have the sole right of trading within certain defined limits. The company was incorporated in pursuance of the Act by a Royal Charter.

In March of this year, 1711, Addison, writing in the *Spectator,* places, as the second of "our society," and next to Sir Roger de Coverly, "Sir Andrew Freeport, a merchant of great eminence in the City of London." He will "tell you," says Mr. Spectator; "that it is a stupid and barbarous way to extend dominions by arms; for true power is to be got by arts and industry." And in the *Spectator* of May 19, 1711, Addison writes: "There is no place in the town which I so much love to frequent as the Royal Exchange. It gives me a secret satisfaction, and in some measure gratifies my vanity, as I am an Englishman, to see so rich an assembly of countrymen and foreigners consulting together upon the private business of mankind, and making this metropolis a kind of emporium for the whole world. * * * Trade, without enlarging the British territories, has given us a kind of additional empire."

Nothing so far about bubbles!

Still another company created by Royal Charter in pursuance of a special act was the London Assurance. A public general statute passed in 1719,[18] empowered the King to grant two several charters incorporating two separate bodies for the insurance of

[18] 6 Geo. I, c. 18.

ships at sea. Under this Act Royal Charters were granted to the London Assurance in 1720, and to another company in 1721. In *Elve* v. *Boyton*,[19] Lindley, L. J., with reference to these charters, or one of them, says:

"Now consider for a moment what the Crown could do, and what it could not do at that time. The Crown could by its prerogative incorporate any number of persons who assented to be incorporated. * * * But it was not in the power of the Crown to give those persons any rights in the way of monopolies. What does this Act of Parliament of the 6 Geo. I do? It empowers the Crown to grant charters of a particular kind—to grant charters which the Crown could not grant apart from the provisions of this Act * * *. It gives them a monopoly in matters of assurance and bottomry which the corporations could not have had without the Act."

III.—Companies Incorporated by Special Acts of Parliament.

Lord Lindley says:

"If a charter could not be obtained from the Crown, a company which desired to be legally recognized as such was compelled to apply to Parliament for a special Act of its own. The Act usually sought was either an Act incorporating the company, or an Act which, without incorporating it, authorized it to sue and be sued by its secretary or some other officer * * *. [Some] incorporating Acts rendered the members of the company liable for its debts to the extent of their respective shares of a nominal capital of the company, or of so much thereof as might not have been paid up." [20]

So that many of them must have had a joint stock.

In the absence of any provision in an act of incorporation, the law as to the liability of the members for debts was the same as in the case of a Royal Charter.

"A corporation is a legal *persona* just as much as an individual; and, if a man trusts a corporation, he trusts that legal *persona*, and must look to its assets for payment; he can only call upon individual members to contribute in case the Act or Charter has so provided." [21]

It was business-like to pass an Act which obviated the necessity of inserting in these special acts minute provisions as to constitution and management, and in 1845 there was passed the Com-

[19] (1891) 1 Ch. 501, 507. [20] Lindley on Companies (6th ed.) 4.

[21] Per Cave, J., in In re Sheffield and South Yorkshire etc. Society (1889) 22 Q. B. D. 470, 476.

panies Clauses Consolidation Act, comprising "in one general Act sundry provisions relating to the constitution and management of joint-stock companies usually introduced into Acts of Parliament authorizing the execution of *undertakings of a public nature* by such Companies." By sec. 1 the Act is to apply to every joint-stock company by any future act incorporated for the purpose of carrying on any such undertaking, and is to be incorporated with it, and "all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the company which shall be incorporated by such Act." The Act gives a kind of limited liability. By sec. 36, if any execution is issued against the effects of the company and there cannot be found sufficient whereon to levy it, then execution may be ordered to be issued against any of the shareholders "to the extent of their shares respectively in the capital of the company *not then paid up.*" By sec. 37, if under such execution any shareholder pays any sum beyond the amount then due from him in respect of calls, he is forthwith to be reimbursed by the directors out of the funds of the company. The liability, though limited, is enforced by the creditor, not by the company, which is not the modern method.

This Act, as amended, applies to companies incorporated for such purposes as constructing a railway.

IV.—Unregistered Joint-Stock Companies.

Up to 1612 or 1613 the voyages of the East India Traders had, as has been pointed out, been conducted on the terms rather of a "regulated" company than a joint-stock company. This was

"less favorable to the power and consequence of a governor and directors than trading on a joint-stock, which threw into their hands the entire management and power of the whole concern. Accordingly they * * * in 1612 were enabled [22] to come to a resolution that in future the trade should be carried on by a joint-stock only. It still appears to have been out of their power to establish a general fund, fixed in amount and divided into shares, * * * but [members] now * * * subscribed, not each for a particular adventure, * * * but all into the hands of the Governor and Directors who were to employ the aggregate as one fund or capital for the benefit of those by whom it was advanced." [23]

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[22] It is not said how.

[23] Mill's History of British India (4th ed.) Vol. I, p. 31.

A joint-stock of £429,000 was accordingly raised. The company's "Second Joint Stock Subscription" was opened in 1617-18 and produced £1,600,000.[24] In 1631-32 the company's "Third Joint Stock" was obtained, and amounted to £420,700.[25] New subscriptions were obtained in 1638, 1642-43 and 1647-48, by and before which time the rights of the holders of the various stocks seem to have become considerably mixed.

These joint-stocks are referred to as being early instances of attempts to trade on joint-stock without, apparently, any authority of Parliament or Royal Charter. Royal Charters at this time were, indeed, somewhat at a discount, and after the company and a rival association, countenanced by Charles I, had come to some-sort of a union, overtures were made to Parliament, which passed a resolution directing the trading to be carried on by a joint-stock.[26] This resulted in a "United Joint Stock." Internal dissensions soon took place and in 1654 the United Joint-Stock Holders were petitioning for a change of constitution and asking that "The East India Company should no longer proceed exclusively on the principle of a joint-stock trade."[27] Matters were referred to the Council of State, and by it to the Protector and his Council,[28] and while the directors were willing to get round Cromwell by a loan, the proprietors of the United Stock ("the Merchant Adventurers") obtained from him a commission to fit out some ships for the India trade under the management of a committee.[29] The Council of State ultimately decided in favor of exclusive trade with joint stock, and the company and the Merchant Adventurers then (possibly after another charter) opened a new subscription.[30]

How the New or English Company was afterwards formed as a joint-stock company under Royal Charter has already been pointed out in Division II. The Old or London Company there referred to made the best of the remaining three years. As a corporation it was able to subscribe and did largely subscribe towards the £2,000,000. The shares in the New or English Company fell to a discount, and after some rivalry between the two companies, and proposals for the union of them, there was a "tripartite" amalgamation deed (dated July 22, 1702) to which Queen Anne herself and the two companies were parties, and which was passed under the Great Seal, whereby it was agreed that

[24] Id., p. 38. [25] Ib., p. 65. [26] Ib., p. 78. [27] Ib., p. 82.
[28] Id., p. 86. [29] Ib., p. 87. [30] Ib., p. 89.

the London Company should purchase from the English Company so much of the capital stock of the latter as would make the property of the former equal to the property which would then remain to the other members of the English Company, and that all trading for a certain time should be for the benefit of the stockholders of the English Company (including the new members) in proportion to their shares, during which time the London Company was to have an equal voice in the management of the trade, and that afterwards the whole trade should be carried on by the English Company under the Charter of 1698. It is stated that there was provision for the two companies taking the common name of "The United Company of Merchants trading to the East Indies," but the Act next mentioned shows that in law there remained two separate companies under their former names, and their differences were ultimately settled by an agreement to refer to the Earl of Godolphin, the Act 6 Anne, c. 17, and the award of Godolphin made thereunder in 1708.

In the very year of, and just before the passing of the Bubble Act (1719) the Act 6 Geo. I, c. 4 was passed "for enabling the South Sea Company to increase their present capital stock and fund by redeeming such public debts and incumbrances as are therein mentioned." This and previous Acts, some of which have already been referred to, show that the principle of joint-stock trading was not too bad to be approved and adopted time after time by the Legislature, and its example was followed by large partnerships professing to trade on a joint-stock, in shares purporting to be transferable without the assent of all the members.

Even before 1719 "we read of bubbles sufficiently important to attract the notice of the Legislature." [31] The speculative transactions and operations of the South Sea Adventurers are matter of elementary history. But, says Collyer,

"the thirst for speculation was not confined to them. The whole nation had become adventurers, and every day produced new commercial companies, some for useful, others for the most chimerical purposes; some founded on obsolete charters and others, the most numerous, not affecting the least authority of that nature." [32]

Pope, writing to Dean Swift on June 20, 1716, says: "So churches sink as generally as banks in Europe, and for the same reason—that Religion and Trade, which at first were open and

[31] Collyer on Partnership (2nd ed.) 724. [32] Ib., 725.

free, have been reduced into the Management of Companies, and the Roguery of Directors." Some of the Bubbles were, then, burst by 1716, which was shortly before the Bubble Act was passed. At that time the "subscriptions" for joint stock were very various and numerous. Anderson says:

"Some of the obscure keepers of these books of subscriptions, contenting themselves with what they had got in the forenoon by the subscription of one or two millions * * * were not to be found in the afternoon of the same day, the room they had hired for a day being shut up, and they and their subscription books never heard of more. On others of these projects *2s.* and *2s. 6d.* per cent. was paid down; and on some few *10s.* per cent. was deposited, being such as had some one or more persons of known credit to midwife them into the alley. * * * Some were divided into *shares,* instead of hundreds and thousands, upon each of which so much was paid down, and both for them and the other kinds there were printed receipts signed by persons utterly unknown." [33]

One project was advertised to be "For subscribing Two Millions to a certain promising or profitable design, which will hereafter be promulgated." A burlesque of this kind of thing was an advertisement that "At a certain (sham) place on Tuesday next, Books will be opened for a subscription of Two Millions, for the Invention of Melting down Saw Dust and Chips, and casting them into Dealboards, without Cracks or Knots." [34]

The author just cited exhibits what he calls "a more complete catalogue than any we have seen of the Stocks, Subscriptions, Projects, or Bubbles of this unparalleled Time, with their highest prices in 'Change Alley' before the fatal *scire facias* had (like the touch of Ithuriel's Spear) reduced them all to their proper size and value." His list is duly classified under such heads as "Great Corporations," "Deserted Companies," "Local and Particular Projects," "Projects or Bubbles having neither Charter nor Act of Parliament to authorize them," while one project, in a class of its own is "For building of Hospitals for Bastard Children."

Lord Ellenborough, in speaking of this situation said:

"Subscriptions had about that period been opened to an enormous extent (to as much, it is said, as 300 millions) upon the wildest schemes imaginable; the shares in such adventures were transfer-

[33] History of Commerce, Vol. II, p. 291. [34] Ibid.

able; they were as common an article of sale at market as the stock in the public funds, and had been sold at immense premiums."[35]

"The fatal *scire facias*" to which Andrews refers, was the writ which was obtained to repeal the letters patent obtained by some of the Bubbles.[36] These writs, which are said to have been issued at the instigation of the South Sea Company, were not issued until after the Bubble Act had passed.

The Bubble Act[37] was passed in 1719, and its title was "An Act for better securing certain Powers and Privileges intended to be granted by His Majesty by two Charters for Assurances of Ships and Merchandises at Sea, and for lending Money upon Bottomry; and for *restraining several extravagant and unwarrantable Practices therein mentioned.*" The Act shows, by the recitals in sec. 18, the associations at which it was aimed, for after referring to those who opened "books for public subscriptions, and to draw in many unwary persons to subscribe therein towards raising large sums of money" for "dangerous and mischievous undertakings or projects related to several fisheries and other affairs," there is a recital "that in many cases the said undertakers and subscribers" had (1) "presumed to act as if they were corporate bodies," (2) had "pretended to make their shares in stocks transferable without any legal authority by Act of Parliament or Charter," (3) had acted or pretended to act under some charter granted for special purposes therein expressed, but had used such charters for raising joint-stocks and making transfers for their own "private lucre," which were never intended by the charter, and (4) had acted under some obsolete charter which had become void or voidable. The Act then declared to be illegal and void undertakings and attempts "tending to the common grievance, prejudice and inconvenience of the King's subjects or great numbers of them," and public subscriptions etc. for furthering, countenancing or proceeding in any such undertaking or attempt, and more particularly the acts numbered (1) to (4) above.

Sec. 19 provided that such unlawful undertakings, subscriptions, making or accepting transfers of shares, etc., and more particularly the things numbered as above, "shall be deemed public nuisances" and tried as such, and punishable by forfeiture, im-

[35] Rex *v.* Webb (1811) 14 East 416.

[36] See the cases of the Welsh Copper Company referred to in Browne *v.* Gibbins (1725) 5 Bro. P. C. 491, 492, and the Lustning Company referred to in Stent *v.* Bailis (1724) 2 P. Wm. 217. [37] 6 Geo. I, c. 18.

prisonment, etc. But by Secs. 22 to 27 the Act was not to apply to (1) any undertakings or other matters or things settled, established, or practiced before June 22, 1718, which were to have the same validity as before the Act; or (2) the two corporations to be established under the first part of the Act; or (3) the South Sea Company; or (4) the carrying on of any home or foreign trade in partnership in such manner as had been usual and might be legally done (except marine insurance and bottomry); or (5) any corporation formerly created for carrying on a trade which they had continued to carry on from the time of their establishment; or (6) subscriptions for enlarging the capital stock of the South Sea Company, or (7) the East India Company.

Collyer says:

"It may be fairly conjectured that the Bubble Act itself was passed at the instigation of the South Sea Company; and was, therefore, a mere machine for propping up the credit of that company; consequently, that it was made with no real view to the interest of trade in general, and is not to be considered, so far as the intentions of the framers were concerned, as declaratory of the common law in regard to mercantile companies.".

Lord Lindley says that the attempt to put down joint-stock companies by the Bubble Act was futile, and that, notwithstanding it, joint-stock companies increased both in number and importance.[38]

The Bubble Act was repealed in 1835 by the Act 6 Geo. IV, c. 91, but some decisions on it may be referred to. About two years after it had been passed a man was punished on an information under the Act for setting up a Bubble called the North Sea.[39] From this time for about eighty-seven years, says Collyer, "the statute appears to have been forgotten; but" in 1808 "a criminal information was moved for against the framer and proprietor of a trading scheme, on the ground that it was expressly against the provisions and policy of the statute." [40] The head-note of the report of the case is quaint. It says that the writing of subscriptions to a transferable joint-stock

"by holding out false and illegal conditions, such as that the subscribers would not be liable beyond the amount of their respective

[38] Lindley on Companies, p. 3.

[39] Rex *v.* Cawood (1724) 2 Ld. Raymond 1361.

[40] Rex *v.* Dodd (1808) 9 East 516; Collyer on Partnership (2nd ed.) 728.

shares, seem to be an offence within the act. But as the statute had not been acted upon for a great length of time, and was now sought to be enforced by a private relator, who seemed not to have been deluded by the project, but to have subscribed with a view to this application, the Court refused to interfere by granting an information, though they discharged the rule without costs."

The British Ale Company was a public company, neither incorporated by charter nor Act of Parliament, and its shares were transferable; and Lord Mansfield held that it was within the Act, although there was no evidence that beer tended to the common grievance, prejudice or inconvenience of His Majesty's subjects.[41] The Philanthropic Annuity Society, an unincorporated company, with transferable shares, was held by Lord Ellenborough to be within the Act and illegal.[42] In *Rex* v. *Webb*[43] Ellenborough, C. J., doubted

"whether the mere raising of transferable stock is in any case, *per se,* an offense against the Act, unless it has some relation to some undertaking or project which has a tendency to the common grievance, prejudice or inconvenience of His Majesty's subjects or great numbers of them."

But this is contrary to what was laid down in 1825 in *Josephs* v. *Pebrer*[44] that

"if the projectors * * * before the association has been sanctioned either by an Act of the Legislature or by Royal Charter, make shares in the concern transferable without any restriction, at the mere will of the holder, and provide that the purchasers shall render themselves liable to regulations to be passed by persons styling themselves a committee of management or directors, then the association assumes an unlawful shape."

When there were restrictions on the transfer of shares—*e. g.*, requiring the approval of the committee, or that transferees should be members of the company—it was held that the company was not necessarily illegal.[45]

Lord Lindley says that the Bubble Act "probably gave rise to much more mischief than it prevented," but that "the repeal of the Act still leaves room for the contention that companies of the

[41] Buck *v.* Buck (1808) 1 Camp. 547.

[42] Rex *v.* Stratton (1809) 1 Camp. 549, note.

[43] (1811) 14 East 416. [44] (1825) 3 B. & C. 639, 641.

[45] Rex *v.* Webb (1811) 14 East 416, Pratt *v.* Hutchinson (1812) 15 East 511, Ellison *v.* Bignold (1821) 2 J. & W. 510—cases which may be useful in interpreting a section of the Companies Act, 1907.

nature described in the Act are illegal at common law." And it must be remembered that the repealing Act contains a recital, said to have been introduced by Lord Eldon, that it is expedient

"that the said several undertakings, attempts, practices, acts, matters and things aforesaid should be adjudged and dealt with in like manner as the same might have been adjudged and dealt with according to the common law, notwithstanding the said Act."

In *Kinder* v. *Taylor*[46] Lord Eldon said that

"though attention was due to what was the construction of the 6 Geo. I, it ought never to be forgotten that there was a common law as well as a statute. * * * He would repeat that, in the argument (if it ever took place) upon this Act of Parliament, it should never be forgotten that there was a common law, and if the Act was to be construed to destroy the common law remedy, the question then would be, whether such a construction was not at variance with every sound and legal principle of justice."

But Collyer, who produces this case, says himself that the enactment as to "acting as a corporation * * * was" perhaps

"directed against persons who pretended to be in possession of some charter of incorporation, and not against every species of society. But however this may be, it seems to be unquestionable that there are particular offences of this kind for which an indictment will lie, *not only under the statute but even at common law.* It is apprehended, however, that the more general charge of acting as a corporation would not * * * support an indictment at common law, but that there must be additional averments, stating with particularity the nature of the offence,"

and that the opinion of Lord Eldon "must be received with this limitation."

In *Duvergier* v. *Fellows*[47] Best, C. J., says (and after the Bubble Act had been repealed):

"There can be no transferable shares of any stock except the stock of corporations, or of joint-stock companies created by Act of Parliament * * *. The pretending to be possessed of transferable stock is pretending to act as a corporation, and pretending to possess a privilege which does not belong to many corporations. * * * The acting as such a corporation without charter * * * is contrary to law."[48]

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[46] See Collyer on Partnership (2nd ed.) 917.

[47] (1828) 5 Bing. 248, 267.

[48] The actual decision was approved in (1830) 10 B. & C. 826, and in the House of Lords in (1832) 1 Cl. & Fin. 39, although the particular point is not referred to by the Lords.

In *Blundell* v. *Winsor*[49] the Anglo-American Gold Mining Association, an unincorporated joint-stock company formed in 1833, the shares of which might be increased to an unlimited extent and were assignable at the discretion of the holder, was held, by Shadwell, V. C., to be illegal and fraudulent. But, as Lord Lindley points out,[50] in the two last cases there were "additional circumstances rendering it unnecessary to decide on this ground alone" —namely, that joint-stock freely transferable by an unincorporated company made that company illegal.

The Potosi la Paz and Peruvian Mining Association, formed in 1824, but not incorporated, had a capital of a million in shares of £50 each, which were only transferable with the approval of the directors to the transferee, who was required to execute an instrument binding him to observe the association's regulations. There was a clause intimating that each subscriber was liable only to the extent of his share. Lord Brougham said that to hold such a company illegal would be to say that every joint-stock company not incorporated by charter or Act of Parliament was illegal and indictable as a nuisance, and to decide this for the first time.[51] There, again, the power of transfer was restricted.

The Limerick Marble & Stone Company was an unincorporated society founded in 1839 with a joint-stock of £50,000 divided into shares of £100 each, which were apparently transferable, and the Court of Common Pleas held that it was not an illegal company.[52] Tindal, C. J., says:

"The raising and transferring of stock in a company cannot be held, in itself, an offence at common law; such species of property was altogether unknown to the law in ancient times; nor indeed was it in usage and practice until a short period antecedent to the passing of the Bubble Act as is evident from the preamble to the eighteenth section."

And he distinguishes *Duvergier* v. *Fellows*.[53]

The same Anglo-American Gold Mining Association, which was declared to be illegal in *Blundell* v. *Winsor*,[54] was held by the Court of Common Pleas to be legal.[55] From the judgment at page 139 it seems that the only restriction on transfer was "that

[49] (1837) 8 Sim. 601. [50] Lindley on Companies, pp. 132, 133.
[51] Walford *v.* Ingilby (1832) 1 M. & K. 61, 76.
[52] Garrard *v.* Hardy (1843) 5 M. & G. 471.
[53] (1828) 5 Bing. 248, 267. [54] (1837) 8 Sim. 601.
[55] Harrison *v.* Heathorn (1843) 6 M. & G. 81.

the transferee shall have no right to act or receive any benefit until his title shall be approved of by the solicitor of the company—a matter of regulation more properly than of restraint."

Lord Lindley [56] came to the conclusion that

"an unincorporated company with transferable shares will not be held illegal at common law, unless it can be shown to be of a dangerous and mischievous character, tending to the grievance of His Majesty's subjects."

V.—Quasi Corporations.

In 1826, by the Act 7 Geo. IV, c. 46, not only bodies politic or corporate created for the purpose of banking (namely banking corporations), but also any number of persons united in covenants or copartnership, although more than six in number, were authorized to carry on the business of bankers in like manner as copartnerships of bankers consisting of more than six in number might lawfully do, and also to issue notes outside the radius of sixty-five miles from London; but members of such a corporation or partnership were liable for the concern's debts and notes. Before any such corporation or copartnership consisting of six persons could issue bills or notes or borrow, owe or take up any money on its bills or notes it had to make a return at the Stamp Office in London of certain particulars *including the names and places of abode of two or more members who had been appointed public officers, in the name of any one of whom the corporation or copartnership could sue or be sued.* Judgment against the public officer operated against the copartnership and also against its members, although execution could only be issued against the latter under certain conditions. Banks under this Act, which were in operation before May 6th, 1844, were not compelled to come under the system instituted by the Act 7 and 8 Vict., c. 113.

In 1834 an Act [57] was passed enabling the Sovereign by letters patent under the Great Seal to grant to any company or body of persons associated together for any *trading,* charitable, literary or other purposes, and their heirs, executors, administrators and assigns, although not incorporated by such letters patent, any privileges which according to common law, or the Act 6 Geo. IV, c. 91,[58] it would be competent to the Crown to grant by a charter of incorporation, especially the privilege of maintaining

[56] Lindley on Companies, p. 183. [57] 4 and 5 Will. IV, c. 94.
[58] See Division I.

and defending legal proceedings in the name of one or more of the principal officers of the association. The letters patent and the names of such officers had to be entered in books open to public inspection. Judgment in any such proceedings had the like effect on the property of the association and persons and property of every member as if they had been parties and the judgment had been personal against them. Leave had to be obtained to enforce the judgment by execution, and execution against a person could not be obtained when he had for three years ceased to be a member.

This Act was repealed in 1837 by the Act 7 Will. IV and 1 Vict., c. 73, which now bears the short title of the Chartered Companies Act, 1837.[59] This statute also repealed the 4 and 5 Will. IV, c. 94, and enabled the sovereign by letters patent under the Great Seal "to grant to any company or body of persons associated for any trading or other purposes whatsoever, and to the heirs, executors, administrators and assigns of any such persons, *although not incorporated* by such letters patent, any privileges which, according to the rules of the common law it would be competent to the" sovereign "to grant to such company or body of persons in and by any charter of incorporation." In particular the letters patent might enable the association to sue or be sued in the name of one of the two officers who were to be nominated and registered for that purpose; and might effectually provide that the members of the association should be individually liable in their persons and property for the debts, contract engagements and liabilities of the association "to such extent only per share as shall be declared and limited in and by such letters patent," such liability to be enforced as thereinafter provided. A deed or an agreement of partnership had to be entered into appointing the officer to sue or be sued, and stating the number of shares into which the undertaking was divided, and other particulars.

The Act contains elaborate provisions as to transfer, returns, etc.

Judgment against the registered officer was to have the same effect against the property of the association, and also (to the extent thereinafter mentioned) against the persons and effects of the individual existing or former members thereof, respectively, as if obtained against the association in proceedings to which all

[59] See 55 and 56 Vict., c. 10.

the persons liable as existing or former members had been parties, and execution might be issued thereon accordingly; but when the liability per share was limited by the letters patent, execution was not to be issued against an individual member for a greater sum than the residue, if any, of the amount for which by virtue of the letters patent he was liable in respect of his shares after deducting the amount, if any, paid upon the share "by virtue of any former execution" and not repaid to him by the company at the time of issuing the subsequent execution.

"As regards liability to creditors, companies formed under these Acts were essentially *partnerships*"—not corporations—"their members were liable to their last farthing for the debts of the companies; but before recourse for payment of such debts could be had against an individual member it was necessary for the creditors to show that they could not obtain payment from the company." [60]

VI.—Trading Corporations under Letters Patent Granted in Pursuance of a General Statute.

On the 5th of September, 1844, there was passed a statute of forty-nine sections [61] called "An Act to regulate Joint Stock Banks in England." It provided that it should not in future be lawful for any company of more than six persons to carry on the trade of bankers in England under any agreement or covenant of copartnership entered into after May 6th, 1844, unless by virtue of letters patent granted by the Queen "according to the provisions of the Act," but such companies established before May 6th were allowed to go on as before.

New banking companies of more than six persons had to petition the Queen in Council for a grant of letters patent. The petition had to be signed by at least seven of the company, and had to state practically the particulars now stated in the memorandum of association of a company limited by shares. If the Board of Trade reported compliance with the Act the Queen was empowered with the advice of the Privy Council to grant the letters patent. But a deed of partnership (in a form approved by the Council) had to be executed by the holders of at least half the shares, on each of which one-tenth had to be paid up, and the provisions of the deed, with such others as to Her Majesty should seem fit, were

[60] Lindley on Companies, p. 5. [61] 7 and 8 Vict., c. 113.

to be set forth in the letters patent. The letters patent granted that the persons executing the deed and all other persons who should become shareholders in the business, their executors, administrators, successors and assigns, respectively, should be "one body politic and corporate, with perpetual succession and a common seal and power to hold lands of such annual value as should be expressed in the letters patent." But the letters patent were to be for a term not exceeding twenty years, and might be made subject to such other provisions and stipulations as to Her Majesty might seem fit, and, notwithstanding such incorporation, the liability of the shareholder was unlimited. Even after the letters patent had been obtained the company could not commence business until a certain "memorial," containing a number of particulars, had been filed at the Stamp Office.

Banking companies of more than six persons, which had commenced but not completed proceedings for formation before May 6th, 1844, were allowed to go on for a year from the passing of the Act, but not longer (except for the purpose of closing the business) unless they obtained incorporation under the Act. The Act also afforded facilities for banking companies of more than six persons, established before May 6th, 1844, to obtain incorporation under the Act, and gave them (when carrying on business within sixty-five miles of London), even when unincorporated, and on certain conditions being complied with, the power of suing and being sued by a public officer.[62]

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[62] This article will be concluded in the June issue.

THE LAW TEACHER: HIS FUNCTIONS AND RESPONSIBILITIES.

The notion that the teaching of the law is quite as much a profession as is the practice of it, and that it demands an intellectual equipment of a high order, is probably gaining ground. It is fully recognized by those who understand what systematic legal education, as carried on to-day in our leading law schools, really is. But as yet the majority of laymen, and very many lawyers, probably most lawyers who were educated under the old régime as well as most of those who have come to the bar through the law office, fail to appreciate the full significance of the calling of the modern law teacher and to give to him the recognition to which, by reason of his work and influence in his special field, he is entitled. They think of him either as a lawyer in full practice and a teacher only as his professional engagements permit, or as a judge upon the bench and a teacher incidentally, or as one who has failed at the bar and is teaching law because unequal to what they regard as the more strenuous and virile work of the practitioner. This is natural, for undoubtedly a majority of the law teachers of the last generation were practitioners or judges first, and teachers only to the extent that private business or judicial duties would permit; and it is the law teacher of the last generation with whom the public and members of the profession to which reference has been made are most familiar. It was, of course, the fact that it sometimes happened, particularly in the older eastern university schools, that a distinguished practitioner abandoned his work at the bar, or that a judge resigned from the bench, to accept a law professorship as his chief occupation; but in the country generally it was the exception for a person to choose the teaching of the law as a life calling, and but few of the schools had upon their faculties any considerable number of men who were devoting their predominant energies to the work of legal education. These statements have reference to conditions after regular law schools had been established, and not to earlier times, when in several of the universities there were professorships of law which in some instances were filled by resident instructors. The law school of thirty years ago, even the university law school, was certainly a very different place from the law school of to-day. While the attitude of its faculty

toward the work of teaching and in regard to the cause of sound legal learning may not have been one of indifference, it was yet the attitude that naturally and inevitably comes from such a situation, an attitude that prompts a person to give his best thought and to exert his best energies along the lines of the dominating interest. And so it was that under the old régime the law teacher, as a rule, exercised an influence upon the profession and upon the jurisprudence of the country, not so much through his work as a teacher as through his labors at the bar or upon the bench or in the field of authorship. With few exceptions, the law teacher of the last generation was a law teacher only as an incident. On account of the attitude of the profession toward the schools, which was distinctly hostile, he was not always sure, probably, as to the real value of his work as a teacher. In a word, the conditions dominating legal education were such that the man of force and learning and constructive ability would rarely consecrate his life and energy to that cause alone.

It would, however, be a grave mistake to suppose that little was accomplished under the old régime. But for the work of our predecessors in law teaching, the extended and growing influence of the law schools of to-day could not have been realized for years to come. It goes without saying that the initial steps in every great movement must be largely experimental. What the attitude of that part of the public that is to be affected by the change will be, cannot ordinarily be ascertained in advance with any degree of certainty. It must be learned by experience, and the movement as it proceeds must in a measure conform to existing conditions. It may at times be necessary to recognize for a period standards that under more favorable circumstances would be regarded as far too low. And to meet public prejudices concessions must not infrequently be made. Forty years ago the few law schools of the country existed, not in response to a demand from the profession, but in spite of the profession. The average practitioner of even a much more recent date regarded law-school instruction with suspicion, and advised against it. The theoretical work of the schools seemed to him but a poor preparation for the practical work of the bar. Devoted to his profession as an art, he magnified the importance of the mechanics of the calling, so to speak. In his enthusiasm for practical things, he too often lost sight of the fact that the law is first of all a science, and that it must be mastered as a science by the one who

would apply it in a large way as an art. To overcome the prejudices of the profession against systematic and formal instruction in the law, was a great and pressing problem with the law teachers of an earlier date. The extent to which they succeeded in turning the tide in the direction of the schools and the effectiveness of the work of their successors in that regard, while well known to those who are familiar with the history of legal education in this country, are not generally understood by the public or indeed by the profession.

In this connection, therefore, the following facts are significant: In 1870 the number of law schools in the country was twenty-eight, and the number of students in attendance sixteen hundred and fifty-three. Figures in regard to earlier years are not easily ascertained or verified, but it is probable that in 1840 there were less than four hundred law students in the eight schools in which instruction in the law was then given. During the period of thirty years, then, in which the population of the country had a little more than doubled, the number of law students taking instructions in the schools had increased more than fourfold. In the next decade the number of schools increased to forty-eight and the number of students instructed in the schools to three thousand one hundred and thirty-four. The population of the country had, of course, increased in the meantime, but not to an extent that would account for the increased attendance upon the schools. That the schools were at this time receiving more general recognition from the profession is apparent, not only from the increase in the number of students attending, but also from the attitude of the profession as expressed through its leading association. In a report submitted in 1879, the Committee on Legal Education of the American Bar Association said: "There is little, if any, dispute now as to the relative merit of education by means of law schools and that to be got by mere practical training or apprenticeship as an attorney's clerk. Without disparagement of mere practical advantages, the verdict of the best informed is now in favor of the schools." The next year this association, following the suggestion of the report of its committee, from which the foregoing quotation is taken, recommended that "the several state and local bar associations be requested to further in their respective states the maintenance of schools of law." That the request was effective is apparent from the fact that, twelve years later, so numerous had become the schools that a com-

mittee of the same association felt constrained to "deprecate the needless multiplication of law schools." During the ten years from 1885 to 1895 the attendance upon the law schools nearly trebled, the attendance during the latter year being only a little less than ten thousand, while the population of the country increased only twenty per cent. In 1906 the attendance had reached fifteen thousand four hundred and eleven, and the number of law schools had increased to ninety-eight.[1] It is probable that at the present time seventy per cent. of the lawyers come to the bar through the law schools.

While the growth of the law schools has been more pronounced under what may be called the new régime than it was under the old, yet the figures show that the schools received under the latter a patronage and recognition that indicated a changed attitude on the part of large numbers of the profession. And this changed attitude was undoubtedly due in a very great degree to the fact that the law teachers of the last generation were, as a rule, not only teachers, but also practitioners and judges of commanding ability and extended influence. That such men were connected with the schools must have challenged the attention of practitioners and students to what could be accomplished through the schools. Moreover, the earlier teachers were generally men of distinct personality, as well as of great learning—men whose qualities of mind and heart would naturally attract. They also had the good judgment to adapt their instruction to the needs of the practitioner, rather than of the legal scholar, and to make their standards such that they were not beyond the reach of the people. They had the wisdom to keep in touch with existing conditions and to humor to a degree existing professional prejudices, knowing full well that to deflect the trend of professional opinion towards the schools they must consult the requirements of the profession and avoid sudden and radical changes. In the way of gaining recognition of the schools by the profession they accomplished probably what could not have been accomplished by men of the type of the modern law teacher.

But while the honor of having secured from the profession and the public so extended a recognition of the value of law-school instruction as a preparation for the bar must be accorded in a large degree to the teachers under the old régime, it is quite apparent

[1] The figures as to the law-school attendance since 1870 are taken from the reports of the Commissioner of Education.

that they directly contributed comparatively little to the development of systematic legal training. They were pioneers in law-school instruction; they took the first step; they had the courage necessary for the experiment, and they demonstrated that law could be taught in the schools and better results obtained than from reading in an office, even though it was taught without particular regard to the proper relation of the subjects or their historical and logical development. But apparently they gave little or no thought to the proper organization of the law school, to its functions as a unit in university life and development, or to scientific method in law teaching and study. Their predominant interests were not distinctly educational. The result was a condition that to-day would be regarded as intolerable and that would then have discredited the entire movement but for the fact that those identified with it were men whose ability, learning and standing were such that they could carry it on in spite of fundamental defects. The condition in the Harvard Law School in 1869, as described by the late Dean Langdell, is probably typical of conditions elsewhere; and it certainly is, to the personal knowledge of the writer, of the condition in the Department of Law of the University of Michigan at about the same time. He says: "In respect to instruction, there was no division of the school into classes, but, with a single exception, all the instruction given was intended for the whole school. There never had been any attempt by means of legislation to raise the standard of education at the school, or to discriminate between the capable and the incapable, the diligent and the idle. It had always been deemed a prime object to attract students to the school, and, with that view, as little as possible was required of them. Students were admitted without any evidence of *academic* acquirements, and they were sent out from it, with a degree, without any evidence of *legal* acquirements. The degree of Bachelor of Laws was conferred solely upon evidence that the student had been nominally a member of the school for a certain length of time, and had paid his tuition fee—the longest time being one and a half years."

It is perfectly apparent to one familiar with the facts that the permanent victory of the law schools could never have been achieved but for a radical change of policy. University authorities finally became quite generally convinced that, if law were a proper subject for university instruction and study, work in this field

should be placed upon a university basis. They did not abandon the notion that the primary work of the law school should be to fit young men for their duties as practicing lawyers, but they rather adopted the additional notion that the best possible training for such duties is the scientific study of the law from the sources in accordance with a carefully arranged plan and under the direction of men whose predominant energies are given to the work of investigation and teaching. The carrying out of this meant a complete reorganization of the schools, a change of methods, and, above all, the development of a body of trained law teachers. And this is what the leading law schools have been and still are seeking to accomplish. Although legal education must as yet be regarded as, in a measure, within the transitional and experimental stage, most gratifying results have already been realized. Moreover, the future promises much. Requirements for admission to the university schools have been materially increased, a course of study covering three years, the subjects of which are arranged with a view to their proper order and relation, has been very generally adopted; the end sought through the present methods of instruction is, not only the mastery of legal principles, but the development at the same time in the student of the power of legal reasoning, and, most important of all, the teaching of the law under the stimulus and opportunities of modern changes has become a profession that is attracting many forceful and scholarly men who would rank as leaders in any calling. "It is the simple truth," said the late Professor Thayer, "that you cannot have thorough and first-rate training in law, any more than in physical science, unless you have a body of learned teachers, and you cannot have a learned faculty of law unless, like other faculties, they give their lives to their work."[2] The university authorities now recognize this truth to the extent at least of realizing that the law teacher should devote his life to the work. And it is upon the general recognition by universities, the profession and the public, of the truth in its entirety that the future effectiveness of our law schools and the scholarly development of our jurisprudence must very largely depend.

The primary function of the law teacher is undoubtedly to teach, but, while this is true, it would be a mistake to conclude that his time and energy should be entirely absorbed, or indeed absorbed in any very large degree, in the formal work of imparting instruc

[2] Thayer's Legal Essays, 374.

tion. Before a man can teach properly he should know, and before a man can count himself master of any subject it must be his to the extent of its length and breadth and depth. A first requisite of effective law teaching, as is the case in other fields, is profound scholarship—not the scholarship of the practitioner who investigates from time to time parts of subjects to meet immediate professional demands, but the scholarship that comes from scientific and systematic study in a rather limited field of our jurisprudence. No man can know all the law, but it is entirely possible for one to supplement a general knowledge of legal principles by exact and comprehensive acquirements in one or two departments of the law. The ideal law teacher is the one who naturally has the teaching power, who has had practical experience at the bar, and whose practical experience has been supplemented by the labors of the scholar to such an extent that he is master of the ordinary problems that lie within the field of his specialty and well equipped for the solution of the extraordinary ones. But if our law schools generally are to have such teachers, further changes are necessary. The initial step toward the realization of such an end has been taken in the very general recognition by university authorities that it is of the first importance that the law teacher should confine his efforts to work within the field of legal education. The next step is the conversion of these authorities to the notion that the law teacher should never be required to cover in his work more than a comparatively limited field. It is quite as absurd to expect a law teacher to become a master of half a dozen disconnected subjects in the law and to speak and write in regard to them with authority as it would be to expect a teacher in the field of science to compass in his work half a dozen different sciences. The result, if such an attempt is made, must necessarily be to make of a man a retailer, so to speak, of second-hand opinions, and, through the exhaustive work of the many class exercises that the extent of the field necessitates, to incapacitate him for independent work as an investigator. The weakness of the law schools of to-day is to be found, not in faulty methods of instruction or in a dearth of brainy and energetic men upon the faculties, but in the fact that, as a rule, the law teacher is expected to be familiar, for the purposes of the class room, with so wide a range of subjects. In the first place, he cannot, under present requirements, have, as a rule, the solid and substantial knowledge that every law teacher should have. And,

furthermore, no one can be the slave of such a system for many years without the loss of effectiveness, for the tendency of work under such conditions is to crush out that which in the teacher is so essential—the enthusiasm and freshness that come from the consciousness of having done something worth while in one's chosen profession. No good reason can be advanced for the providing of ways and means for thorough and effective scholarship in teachers of literature, history, science, or any other recognized university subject, that is not also a reason for the providing of such ways and means for effective scholarship in teachers of law. If law is to be a university subject at all it should be, so far as opportunities for the cultivation of a scholarly attitude in regard to it are concerned, upon the basis of other university subjects. To put it there, a material increase in the number of the teaching force in most of our law schools—such an increase that the instructor may be limited either to a single subject or to two or three closely related subjects —would be necessary. This would mean, of course, large additional expenditures and the very general abandonment of the notion that possesses some governing boards that the law school should be a paying part of the concern and should willingly contribute from its surplus to aid less remunerative departments. Not until such expenditures can be made will it be possible for law teachers generally to enjoy the opportunities that are essential for profound scholarship. Under present conditions it is only the exceptional man who can rise above the ordinary. Not that all would become jurists of distinction if materials and time for scholarly investigations were at their disposal, but the general standard of scholarship would be materially advanced, and a much larger number than at present would become recognized specialists in their respective fields.

Not only should the law teacher be the master of his subjects from the point of view of the legal scholar for the purposes of instruction, but he should be so because it is his duty, as being clearly within the functions of his calling, to make permanent contributions to the store of legal knowledge. If he can have the time necessary for thorough investigations, no one is more favorably situated than he to do original and effective work in the field of authorship. In the first place, his environment and the demands upon him as a teacher impel him to approach his task in the scholarly spirit and to seek to exhaust all that the authorities have

to yield upon the subject. And, secondly, he is unhampered by professional engagements and by professional ambitions that might at times serve to color conclusions. Furthermore, he is free to criticize judicial precedents and to urge changes and reforms to an extent that might be embarrassing to one occupying a place upon the bench, or indeed to one practicing at the bar. In a word, the law teacher is in a situation to show, through the publication of the results of his work, not only what the law within a given field has been and is, but also what it should be. If he is wise and conservative and judicial, as well as scholarly, in his attitude he may do constructive work of great importance in the way of reforming our jurisprudence. It has been well said that no wise and well-directed efforts in the field of legal reform "can dispense with the approval and co-operation of the legal scholar."[3] But without regard to changes and reforms, every generation needs and must have a restatement of the law in its principal departments, and it is certainly within the legitimate functions of the law teacher to contribute a large part of the scholarly work by which alone such restatement can be made most useful to the practitioner and a distinct contribution to the science of jurisprudence. It is within the function of the law teacher, I say, to contribute a large part of the scholarly work for such restatement. It is perhaps unnecessary that I should add that in my judgment it is no part of his duty to engage in "pot-boiling" authorship, and that it is a matter of profound regret that so many able men are compelled, because of the meagreness of their university compensation, to exhaust their energies and in a measure unfit themselves for better things by the drudgery of mere compilation. The authorship to which the law teacher should aspire is the authorship of the learned and exhaustive treatise that marks an epoch in the history of the subject considered. Several such works already stand to the credit of the schools; some of them are recent and as yet not thoroughly known, but they are appreciated by those who have tested their merits; others have been so long and so favorably received that they have attained an authoritative force but little inferior to that of judicial decision. It should be remarked, moreover, that works of the character indicated are not of value simply to the lawyer and student of jurisprudence. They are of general value, for they are distinct contributions to the history of our civilization. It is in its

[3] Thayer's Legal Essays, 363.

law and its legal history that the quality and characteristics of the civilization of a country are most vividly reflected; and, therefore, in a sense, every scholarly contribution to law is a contribution to history. It is to be hoped that substantial relief from routine duties will give to the law teacher of the future larger opportunities in the field of research and legal authorship than the teacher of the present enjoys, and that the results of his work will justify the change of policy.

But, while the scholarly attitude is of the highest importance and should be cultivated by the law teacher, it would be a mistake to conclude that he has performed his whole duty by making himself the master of his specialty and contributing somewhat to the general store of legal knowledge. He should be more than a legal scholar—more, indeed, than a good teacher. He has, of course, incidental duties connected with the shaping of the policy of his school and of the university of which it forms a part. But without dwelling upon these, although they are by no means unimportant, I beg to suggest that, by virtue of his calling and his responsibilities to the profession, *public* functions devolve upon him that are quite as imperative as those that have to do with scholarship, or with questions of departmental or university policy. It always has been very largely through his efforts that standards for admission to the study of the law have from time to time advanced as the opportunities for preliminary training have come to be more generally within the reach of the people, and it is upon him that the burden of securing higher standards for the future must chiefly rest. The law teacher realizes, more keenly probably than any one else, because his attention is constantly challenged to the fact that, as a rule, the strongest students in law are those who have had an extended and systematic preparatory training. It stands to reason that this should be so. The law is an intensely intellectual profession, and the successful study of our jurisprudence requires the mastery and control of one's intellectual processes and the development of one's reasoning faculties to a degree that is ordinarily attained only after long disciplinary study. Of course, in dealing with this problem of preliminary requirements, we must recognize—and the law teacher certainly does, for it is not infrequently brought to his attention—that some men are fitted by nature for the study and practice of the law, and that with such men the matter of preliminary training is of minor importance. The intellectual grasp

and the attendant power of lucid and logical statement that thorough and systematic and extended preliminary training is supposed to give are with such men natural endowments. But the law teacher knows that such cases are exceptional, and that, while standards may, within proper limits and subject to proper restrictions, be waived to meet the occasional exceptional case, it is with the average, rather than with the exceptional, man in view that they should be determined upon and fixed. To one who has given attention to the situation it is quite apparent that the law teacher must be the leader in the matter of advancing preliminary standards. He is more closely in touch with the law student than is the practitioner, and he has more clearly defined notions as to his needs. Moreover, he is thoroughly alive to the importance of substantial preliminary requirements, while the average practitioner is unaccountably indifferent. The practitioner may follow the teacher in such matters—he usually does after a fashion—but he rarely takes the initiative. He regards his profession as a learned one, but he too often forgets that a profession, in order properly to be ranked as learned, must have a substantial basis in general culture and intellectual acquirement. The immediate field of the law teacher in the matter of preliminary requirements is, of course, the law school, and his work in that field has yielded most encouraging results. The average university law school of two decades ago had practically no requirements for admission. Now a high-school course of four years is the ordinary requirement. In several schools one year of college or university work either now is or soon will be required, while in a few two years of such work are exacted. It is probable that in the near future the equivalent of at least two years of college or university work will be the general requirement for admission to university law schools, and that the list of those schools that require of their matriculates the college or university degree will be somewhat enlarged. And this will be the direct result of the work of the law teacher. That the influence of his efforts in this regard is not confined to the schools, but that it is reaching the public and the profession, is seen in the fact that in many of the states the laws regulating admission to the bar have been materially improved, not only in providing for more thorough preparation in the law, but also in requiring of the candidate at least a high-school training. It is well known that some of this legislation has been suggested by law teachers, and all of it has undoubt-

edly been more or less inspired by the example of the law schools in raising the standards.

But the work of the law teacher in this field is by no means done. Indeed, the preliminary and professional requirements of the schools in some sections are likely to be materially affected by the laws governing admission to bar examinations and by the attitude of examining boards. The difficulties that confront the law schools are not fully appreciated. It is not generally understood, I think, that in the matter of advancing preliminary standards they are distinctly at a disadvantage as compared with the medical schools. In practically every state at the present time, before one can be admitted to an examination for a license to practice medicine he must show to the examining board that he has been graduated from some reputable medical college, while graduation from a law school is not a prerequisite to an examination for admission to the bar in any state. The medical schools, therefore, are a necessary part of the legal machinery governing admission to the practice of medicine, but the law schools are not a necessary part of the machinery governing admission to the bar. The medical schools may advance their standards, both preliminary and professional, and students must meet them or stay out of the profession; but no such result follows the raising of law-school standards, for the way to the bar through the office and examining board remains open. As a matter of fact, the leading law schools of the country are in their preliminary standards, and most of them are in their professional standards, distinctly in advance of the examining boards. It is doubtful if law-school graduation could be generally made a prerequisite to admission to bar examinations, and the wisdom of such a requirement might be seriously questioned; but that the preliminary and professional requirements of the examining boards should be equal to the requirements of the leading law schools, particularly of the state schools where there are such, cannot admit of doubt. To aid in bringing about such a condition is certainly within the legitimate functions of the law teacher.

The life of the law teacher is a quiet one, and to the public, and possibly to the profession, it may seem to be one of limited opportunities and of small responsibilities. But is it? It could hardly be said to be so, even if it compassed no more than his daily routine of study and instruction and his general work in the field of legal education; but when it is remembered that, in the exercise of these and other functions herein set forth, he brings to bear a distinct

molding force upon the young men who are committed to his care and direction, and that to a large degree their futures are determined, not only by the quality of his instruction, but by his example and influence, the real opportunities of his life and the serious responsibilities of his calling must be appreciated. Neither the profession nor the public can regard the work of the law teachers as unimportant or the responsibilities as slight when confronted by the fact that the professional standards of the future are really in their hands. The influence that is exerted in the training in the principles of the law and in the ethics of the profession of seventy per cent. of the young men who come to the bar is certainly far-reaching; and no conscientious teacher can devote his life to work in this field without a profound sense of the responsibilities that attach to the calling.

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THE CHANGE OF THE PROPERTY IN GOODS BY SALE IN MARKET OVERT.

I fear the subject of this paper is not of much practical importance to American lawyers, as I understand that the Courts of the United States have not adopted that part of the English Common Law with which it deals. Nevertheless, I venture to think what follows may prove of some interest to the readers of this REVIEW, possibly of more interest than if the subject-matter were one frequently occurring in daily practice.

The general rule of the common law is that the purchaser of a chattel takes it subject to what may turn out to be infirmities in its title; a seller can give no better title than he himself has. To this rule there are well known exceptions, in the case of sale of goods in market overt and in the case of transfer of negotiable instruments.[1] The first exception is thus declared by sec. 22 (1) of the Sale of Goods Act, 1893:[2] "Where goods are sold in market overt according to the usage of the market the buyer acquires a good title to the goods, provided that he buys them in good faith and without notice of any defect or want of title on the part of the seller." "Market overt" means a public market or fair legally held by grant from the Crown or by prescription, or probably by authority of Parliament.

This exception to the general rule is usually said to be founded on the supposed duty of one whose goods have been lost to search for and claim them in the market place. If he fails to do so, and they are sold there, he loses them by his own negligence and the innocent purchaser ought not to suffer. This explanation of the rule is, however, not a satisfactory reason for its existence. If an owner is to lose his goods by mere negligence in asserting his title, there is no reason for limiting the principle to the particular negligence in question; and further, it ought only to apply to cases where the owner has had a reasonable opportunity of claiming the goods before they are sold, and has not availed himself of his opportunity. But no such limitation has ever been put on the rule. The exception was probably one adopted by the common law from

[1] The title conferred by a factor is a title by estoppel only at common law. The statutory extension of the common law rule is now to be found in the Factors' Act, 1889.

[2] "An Act for codifying the Law relating to the Sale of Goods."

the law merchant, or customary law of merchants, and the reason given for its origin is really only a rather ingenious ground for supporting the custom as reasonable. It was adopted as a common law rule sometime in the 14th, or first half of the 15th century; though even before that time a sale in market overt was recognized as one which ought to give the purchaser more protection than he would derive from a private sale. Thus Bracton, writing in the reign of Henry III of the effect of sale in market overt says: "If a person has bought a stolen article publicly in a market or fair in the presence of the bailiffs or other honest men, thinking it to be purchasable, and has paid toll and customs, even though he cannot produce a warrantor, he shall be set free when he has restored the article to the true owner, but nothing shall be returned to him of the price." Though the sale of the stolen goods in market overt did not confer title, it relieved the purchaser from the consequences of being in possession of stolen property. If they had not been bought in market overt, the purchaser could clear himself by producing a warrantor—*i. e.,* the person from whom he said he bought—and, if the warrantor admitted the sale, the purchaser was set free and the true owner brought his appeal against the warrantor, who in turn might call another warrantor from whom he bought. If the warrantor denied the sale, the issues between them would be tried by battle.[3] Where, however, the sale was in market overt the purchaser could without calling a warrantor, clear himself by restoring the stolen property to the owner.

In the time of Edward I, however, the law merchant was beginning to be recognized as a distinct body of law. It was probably the law administered in Courts of Pie Powder, the courts which every Lord of a Fair or Market was entitled to hold for the settlement of disputes arising within, and during the continuance of the fair or market. It was essential to the effective exercise of this jurisdiction that disputes should be there and then finally disposed of. The court held during the continuance of a fair had no jurisdiction to decide on questions arising out of the transactions of a preceding fair.[4] In such courts the clumsy procedure detailed by Bracton would not be available—and it may be readily assumed that merchants would insist that their title to goods bought in open market should be unimpeachable. It must be remembered

[3] Bracton, Lib. II, Tract 2, Cap. XXXII, f. 150b.

[4] Goodson *v.* Duffield (1612) Cro. Jac. 313.

that markets and fairs (especially the latter) were not mere local markets for the sale of country produce, but were the meeting places of merchants from all parts of the country, and were attended by foreigners to sell their wares and buy the goods of the country. To such men, moving from place to place and knowing nothing of the people with whom they were dealing, the "negotiability" of goods would seem as essential to trade as the negotiability of written promises to pay money, a doctrine which seems to have grown up contemporaneously.[5]

The law as to sale in market overt had been adopted and was well recognized as part of the common law by 1457. In that year there was argued in the Exchequer Chamber an information by the King claiming certain jewels. The defendant pleaded that the jewels had been pledged with him in the City of London and that by the custom of London he was entitled to keep them even against the true owner till they were redeemed by payment of the debt. The custom was held bad, and, in any case, not binding on the King. It may be noticed that the actual decision was only as to the effect of pawning[6] and did not touch the question of sale in market overt. In the course of the argument reference is made by the judges to the law as to sale of goods in market overt, and Prisot (Chief Justice of the Common Pleas) says that "if a man carries away my goods and sells them in market overt, the property by this sale shall be altered; but this is not so unless he pays toll for them"[7], and Fortescue (Chief Justice of the King's Bench) says,[8] "if my goods are carried away by one who sells them in market overt the property is not altered unless he pays toll for them, and if he does not pay toll I can seize them afterwards." How much earlier than this the law was recognized I do not know.

In the reigns of John and Henry III great numbers of grants of markets and fairs were made. Some existed before the Conquest, and there are indications in the few remains we have of Anglo-Saxon law that sales in public markets were encouraged

[5] See Selden Society's Publications, "Select Pleas in Manorial Courts," Vol. II; Professor Maitland's Introduction, p. 133, and the text, p. 152.

[6] The supposed custom as to pawning seems to have died hard, and the intervention of the legislature was finally required to kill it. It was enacted by 1 Jac. I, c. 21, sec. 5, that "no sale or pawn of any goods wrongfully taken or stolen from any person and which at any time shall be sold, pawned or done away with in the City of London * * * to any broker or pawntaker shall work any change of the property" from the true owner.

[7] Y. B. 35 Hen. VI, f. 29. [8] At f. 29 b.

as giving greater security against the theft of personal property. But under the Plantagenets there seems to have been a great increase of trade, and open markets were the places where merchants from all parts of the world gathered to buy and sell, and where the merchant law would be administered. The Charter Rolls, the *Placita de Quo Warranto* and the statutes bear abundant testimony to the rapid increase of business in markets and fairs in this period. The Charter Rolls between the first year of King John and the twenty-second of Edward IV show between 2,500 and 3,000 grants of new fairs or markets or confirmations of old grants. In the case of the *King's Jewels*, above referred to, it was said that in order to change the property in stolen goods it must be shown that toll was paid on the sale, and Prisot[9] says "issue is always taken on the payment." This was, however, denied some 15 years later in the case hereinafter referred to,[10] and it is now well established that the proof that toll has been paid is only necessary in those cases where toll is payable according to the usage of the market. Toll is not incident to a market, and at all times there have been toll-free markets. A grant of a market or fair did not confer a right to take toll, unless toll was expressly mentioned, and in many grants there is no mention of toll. Moreover some persons are, and always were, exempt from paying toll at common law, such as ecclesiastical persons, lords of manors which are ancient demesne, and their tenants, and the King and Queen Consort. There are also exemptions by grant or prescription. Hence the rule as to payment of toll is stated by Coke[11] to be that, "By the common law the property was altered (though some opinions be to the contrary) by sale in market overt albeit no toll was paid, either in respect of the freedom of the fair or market, wherein no toll at all was to be paid, or for that many were discharged of toll, as the King, etc." It could not have been supposed by the judges of Henry VI's time that toll was payable on all sales in market as toll-free markets and exemptions from toll were well known at that time—probably much better than they are now; but for some reason it seems to have been thought that the special benefits attaching to sale in market overt should be confined to those sales on which in fact toll was paid. This idea may perhaps be traced to some lingering memory of the

[9] *Loc. cit.* [10] Y. B. 12 Ed. IV. ff. 8 and 9.
[11] Inst. II, 714.

common law as stated by Bracton. The payment of toll would show that the sale took place, if not in the presence of, at any rate with the cognizance of, the bailiffs of the market.

When the case of the *King's Jewels* was before the Exchequer Chamber reference was made to the custom of London by which every shop in the city is market overt, on all days of the week (except Sundays and holidays) from sunrise to sunset. Most of the judges regarded the custom as impossible. Only a few years before they had insisted in the case of the *Prior of Dunstable*[12] "that a market must be in a public place," and that a butcher of Dunstable could not claim by prescription that a sale in his private shop was a sale in the market. And in the *King's Jewels* case Fortescue, C. J., took the same view of the custom of London. He says: "Those of London claim to have market overt in every shop, *which God forbid*"; and he harangues against the supposed custom as a great mischief and against reason as it would enable anyone to buy stolen goods in his shop privately, and before the owner could claim them, so he would be without remedy. However, 15 years later[13] the custom of the City of London was established, the Court of Common Pleas allowing a plea setting up that "by the Custom of London every day of the week is market overt there and that the property in Stolen Goods passes by sale without payment of toll," and, apparently, though the sale takes place in a shop. This custom has been frequently recognized and defined since that time.[14] It is discussed and its limits are minutely defined by Sir Alfred Wills in the recent case of *Hargreave* v. *Spink*,[15] where it was decided that a sale of jewels to a jeweller in the City of London in a show room over his shop to which customers were only admitted by special invitation was not within the custom. The ground of the decision was that the custom only applies to sales in that part of the shop to which the public are ordinarily admitted, and (*semble*) also on the ground that the sale was to and not by the shopkeeper.

The origin of this curious custom may be explained. In early

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[12] Y. B. 11 Hen. VI, j. 19. [13] Y. B. 12 Ed. IV, ff. 8 and 9.

[14] See the case of market overt, 5 Rep. 83, where Coke states the custom as he certified it when he was Recorder of London. The customs of London are not judicially noticed but may be certified by the Recorder *ore tenus* to the Court. See Plummer *v.* Bentham, 2 Burr 248, where the procedure is set forth in detail, even to the robes which the Recorder should put on—viz.: "the purple cloth robe faced with black velvet and not his scarlet gown, his black silk one, nor the common bar gown."

[15] (1892) 1 Q. B. 25.

times daily markets were held in the streets of London for the sale of all kinds of wares, as the names of many of our streets still bear witness. Cheapside and East Cheap were obviously markets. The Poultry, Cornhill, Fish Street, Milk Street and Bread Street tell their own tales. From time to time efforts were made by the city authorities to confine marketing to shops or defined market places. In 3 Edw. II there was a proclamation against holding the market in the highway of "Chepe" "as heretofore they have done." In 19 Edw. III poulterers were forbidden to sell in the Poultry and were ordered to keep to their shops adjoining, and a little later the poulterers were cleared out of Leadenhall Street and the butchers of East Cheap were confined within certain limits. It was natural that the merchants who were forced from the public street-markets into their adjoining shops should maintain that sales in their shops should be treated as sales in the market and should have the same validity as if conducted in open street. In fact this was but one phase of the struggle that was going on in many places throughout the country between the rival claims of shop and market. In some places Lords of Markets claimed to prevent all sales in shops on market and fair days. In others they claimed to treat sales in shops as sales in market, and to take tolls and to exercise the right of supervision therein. Again in Bristol, as in London, the shopkeepers laid claim to a custom to have the benefit of sale in market overt for sales conducted openly in their shops adjoining the market place.[16]

By the 16th Century the present law was well established and since then it has gone under but little change save in respect of the sale of horses. In the 16th Century horse stealing was common and stolen horses were easily got rid of at markets and fairs.[17] The Statute 2 and 3 Ph. and M. c. 7 recites this evil, and that by reason of sales of horses mostly taking place "in houses, stables, backsides and other secret and privie places of markets and fairs" the true owners were deprived of their property without remedy, and enacts that all sales of horses in markets and fairs are to be made publicly and a record of the sales is to be kept by a bookkeeper. These provisions are further elaborated by 31 Eliz. c. 12, and unless all the formalities are complied with the sale does not pass the property in a stolen horse. These statutes are still in

[16] Clifton *v.* Chancellor (1600) B. Mo. 624.

[17] Hollinshead's Chronicles (ed. 1587) Bk. II, Ch. 11.

force and are preserved by the Sale of Goods Act, 1893.[18] Probably the formalities are seldom if ever strictly complied with in practice. The burden of proving that they have been is on the person who claims to have acquired title against the true owner.[19]

There is a curious exception to the rule that a sale of stolen goods in market overt gives title against the true owner. If the thief is prosecuted to conviction by the true owner the property thereupon revests in him notwithstanding any intermediate sale in market overt. It must be noticed that this is strictly a revesting of the property. The sale in market overt vests it in the purchaser, and then the conviction of the thief revests it in the true owner. Accordingly, if whilst the property is vested in the purchaser—*i. e.*, before the conviction of the thief—he parts with the goods or consumes them, the owner has no cause of action against him, even though he does so with notice of the theft.[20] But, of course, even an innocent purchaser, who deals with the goods as his own after the conviction of the thief, is guilty of conversion. The origin of this rule may be found in Stanforde's P. C., Lib. III, c. 10: "Fresh Suit." It seems that after Bracton's time the appeal of theft began to die out, and larcenies began to be prosecuted by the King on indictment. On the conviction of the thief his goods were forfeited to the King, and among these were included the goods which the thief had acquired by theft. If, however, the owner of the goods had prosecuted the felon freshly to conviction, the goods were restored to him by the King's officer, as a reward for his diligence.[21] Now, the law of sale in market overt, having been adopted from the law merchant, and not being originally part of the common law, did not bind the King. It is well established that a sale of the King's goods in market overt does not change the property. Not, as Holtford, B., says,[22] because "the King cannot be bound to come to his markets to claim his goods"; but because the King is not bound by the customs of merchants. Now, as the stolen goods, till the thief is convicted and the property is restored by the King, are the King's goods (they seem to have been regarded as the King's before conviction, his

[18] Sec. 22 (2) "Nothing in this section shall affect the law relating to the sale of horses."

[19] Moran *v.* Pitt (1873) 42 L. J. Q. B. 47.

[20] Harwood *v.* Smith (1788) 2 T. R. 750.

[21] See Pollock and Maitland, History of English Law, Vol. I, pp. 162 to 164.

[22] Y. B. 35 Hen. VI, j. 28.

title, I suppose, relating back to the theft) the property is not changed by the sale in market overt, and so on conviction the true owner can get restitution notwithstanding any intermediate sale in market overt. This was the interpretation put upon the Statute 21 Hen. VIII c. 11, a statute passed to remedy *procedure* by enabling justices to grant writs of restitution. The provisions of that act were continued and amplified by sec. 100 of the Larceny Act, 1861, which enables the Court on conviction of the thief upon an indictment by or on behalf of the owner of the goods to award writs of restitution, or order restitution of the property in a summary manner.[23] But even without a writ or order for restitution, "where goods have been stolen and the offender is prosecuted to conviction the property in the goods so stolen revests in the person who was the owner of the goods or his personal representative notwithstanding any intermediate dealing with them whether by sale in market overt or otherwise." [24] It is noticeable that in this statement of the law it is not required that the thief should have been prosecuted by or on behalf of the owner. And this accords with the ancient rule that by whomsoever the thief has been prosecuted the property revests on conviction; and if the prosecution has been undertaken by or on behalf of the owner the Court may make a summary order for restitution. The reason for the rule, however, no longer exists. Forfeiture to the Crown on conviction of felony has been abolished,[25] but sec. 7 of the Forfeiture Act and sec. 24 (2) of Sale of Goods Act together preserve to the true owner the benefit he formerly got from his goods being temporarily the property of the King and so protected from the consequences of a sale in market overt. In later cases the temporary vesting of the property in the King has been overlooked. Thus in *Harwood* v. *Smith*,[26] Lord Kenyon says, "During the interval between the felony and the conviction, the property remains *in dubio*, liable to be defeated by the attainder." In *Peer* v. *Humphrey* [27] Lord Denman criticized this statement, and the Court of Queen's Bench held that the property remains in the original owner until it is sold in market overt, and that the sale gives "a *prima facie* title" to the purchaser, which is divested on the conviction of the thief. Hence a person who buys

[23] See Bentley *v.* Vilmont (1887) 12 App. Cas. 471.

[24] Sale of Goods Act, 1893, sec. 24 (1).

[25] The Forfeiture Act, 1870. [26] *Supra.*

[27] (1835) 2 A. & E. 495.

not in market overt from the thief, and then sells in market overt, is liable to the true owner in an action of trover, the sale by him being a conversion, though the purchaser from him gets title. It seems curious that the true owner should have a right not only to have his property revested in him by the conviction of the thief, but should have also a remedy in damages against persons who have sold them in market overt. Would a judgment against the seller with satisfaction vest the property in the seller, according to the ordinary rule? And, if so, would the subsequent conviction of the thief vest the property in him or revest it in the original owner?

The present law as declared in the Sale of Goods Act, 1893, is the law as established by the time of Coke. Since that time the Courts have not extended, nor are they likely in future to extend, its application, and the tendency of all the later cases has been to keep it within the narrowest limits consistent with the actual decisions before the 17th century. Meanwhile, the analogous doctrine of the negotiability of instruments has made sturdy growth. It is the foundation of the whole of the modern law of bills of exchange and promissory notes, and has been frequently applied to new kinds of documents recognized by merchants as negotiable.

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SOME RECENT LEGISLATIVE TENDENCIES.

Nineteen hundred and seven was a favorite year for the meeting of state legislatures. During the odd-numbered years thirty-five states and territories hold biennial and seven states and territories annual sessions, so that regularly forty-two legislatures meet every other year. In addition, we had last year the quadrennial session in Alabama. Compared with the fifteen regular and the six special sessions of nineteen hundred and six these forty-three legislatures have afforded great opportunities to the student of comparative legislation.

The year was noticeable not only for the legislatures which met, but also for the large number of laws which they enacted. At the close of the sessions, many of which were prolonged to an unwonted length, the record of statutes passed exceeded in most cases, both in size and number, that of previous years. One who has watched the work of legislatures for a considerable period knows that this is not a sporadic impulse on the part of the lawmakers of this year, for the size of the volumes of session laws of the different states has been constantly increasing. In spite of the general tendency to do away with much of the special legislation there is no diminution in the bulk of the law.

The titles only of the acts passed by the legislatures of 1907 reveal at once the great variety of subjects covered. Nearly every department of human activity has been in some way affected by legislative action. Not only is there the usual amount of law concerning our state governments and their revenues, together with much concerning the various local units, but in addition we find a large number of laws affecting business in its various aspects; regulating different corporations, particularly insurance, railway and other public service companies; and much of importance relating to the public health, agriculture, the status of the laboring man, and the family.

In this infinite variety the statute book of to-day is a great contrast to that of twenty or thirty years ago. The old laws concerned themselves largely with the necessary regulation of the various departments of government, and with the courts and their procedure, together with more or less modification or affirmance of the principles of the common law. Many of the subjects upon

which we have recently had the greatest amount of legislation could hardly be found in an index to a volume of session laws issued twenty years ago.

Not only has there been a great increase in the variety of subjects with which the legislature deals, but these subjects are also being regulated with greater minuteness. Taking an example from a field in which lawmakers have recently been very active, we find among the session laws of 1907, not only a regulation of the rates, both freight and passenger, which railways may charge, but laws fixing the time within which they must furnish cars when demanded by a shipper; the rate at which the freight must be moved when it is started; the number of employees that must be carried upon each train; the hours of labor of employees; and the style of headlights; and, in addition, laws requiring permission from some public board before new railways can be built or old ones extended. Similar examples might be given from many other fields of legislative activity.

This increase in the range of subjects covered by modern statutes, especially when the matters dealt with are so minutely regulated, means that the legislature must take more time in the performance of its duties. This was evident in the increased length of the sessions of nineteen hundred and seven. Legislatures which met early in the winter were still in session at the end of June, while some continued into July. Not only did they thus cover a longer period of time, but it is probable that more actual days of legislative work were included. The practice of giving railroad passes to legislators has been almost universal until the past few years. Not long ago some of the states prohibited public officers from receiving such favors. Many more states are now prohibiting their issuance by the companies, except to persons in railway employment. Even where they are not prohibited, it is now much harder for the public official to obtain them. The old legislator could remain at the capital for a few days during the week and then go home to attend to his business, for the trip cost him nothing, but under the changed conditions stern financial necessity is compelling the lawmaker to remain at the seat of government most of the session.

It may be questioned, however, whether this increase in time was proportionate to the augmentation in the work which the legislators had to do. The ordinary legislative session is held

during the winter months. With the approach of the warmer weather the farmers become anxious to return for their spring planting, the business man feels that his business has been long neglected and needs his personal attention, the lawyer feels the pressure of cases which he has had postponed over the term, and there is a general unrest among all the members and a feeling that an early adjournment is desirable. Such an early adjournment could very likely have been had without affecting the quality of the laws by a legislature dealing with the limited range of subjects which formerly received attention. In the modern legislature, with the numerous bills concerning questions about which most of the members knew little when they took their seats, and the demand for action upon such a varied range of subjects, a greater tax has been placed upon the time of the legislator. If such a minute regulation as we now have is desirable, and it seems to be inevitable, this regulation must be with care and knowledge, or it will prove of more harm than good. With work properly done, the early adjournment is an impossibility and the legislator is forced to remain at the capital while his own private business suffers.

In this country, at least as far as state legislatures are concerned, conditions have been such that it has been practically impossible for one to adopt law-making as a vocation. The salaries are usually insufficient to pay even the actual legitimate expense of securing an election to office and the additional expense caused by a residence at the state capital. Our theory is that the legislator is a man with a regular business or profession, and that the legislative session need not interfere with his regular earnings. That theory is becoming somewhat disturbed by the increased time and attention required for the making of laws.

It is undoubtedly true that there were in the past many members of legislatures who made law-making their business, and to whom it was very profitable. I believe, however, that the number of these has been constantly diminished during recent years. We must hope that this tendency is not to be checked by an increasing demand upon the time of the legislators and that the new conditions will not involve a return to the type of legislator comparatively common during past years. It must be remembered, however, that we have not in this country any leisure class from which we can draw our lawmakers, and even if such a class is being created the turning over of legislation to it would be a step out of harmony with American institutions.

In the enactment of this large amount of legislation the lawmakers are undoubtedly acting in response to a very decided public sentiment. Much has been heard recently of the failure of our legislatures to carry out the will of the people, and various expedients, such as the initiative and the referendum, have been advocated for the purpose of bringing the legislators more directly under the control of their constituents. It is apparent, however, that, while legislatures may not always enact laws in exact accordance with popular desire, yet they are not irresponsive to public opinion, as appears from the great extent and variety of the laws which they pass. The members of the legislature would not spend their time away from their own affairs and continue in session as they did in many cases during the past year, unless they were meeting what appeared to them to be a real demand on the part of the people.

The constant increase in our statutes makes more necessary an improvement in the form of their expression. A clear statement of legal principles is of course always desirable, whatever may be their extent. We can, however, more easily pardon prolixity and redundancy in a short volume of statutes than we can in a long volume. The evil is there in both cases, but its consequences increase faster than the bulk of the statutes.

Statutes have long been known as giving striking examples of bad English. They could afford material for the "Things Which One Would Have Expressed Differently" of our comic papers. A classic example of this is the act which gave half the penalty to the informer and half to the poor of the parish—the penalty being transportation for fourteen years. A more modern instance is that of the Montana legislature of nineteen hundred and seven, which enacted that no hotel or boarding house can serve adulterated food unless there is posted in the dining room a large red sign, on which is printed "We Serve on Our Tables No Food Stuffs Which Have Been Harmfully Adulterated."

Improvement in the form of statute law is slow. England has progressed much farther than the United States in this. Since 1869 the office of the English Parliamentary Counsel has been engaged in the drafting of bills. It is to the principles laid down by that office, and particularly by Lord Thring and Sir Courtenay Ilbert, that American legislatures must look for guidance.

Some states have made progress in this line by the appointment of official draftsmen, their services being at the command of any

member whose duty it is to put the ideas of the legislators into proper form. Little effect of this is seen in the legislation of nineteen hundred and seven, for it is too soon to hope for much improvement, but the movement cannot but be beneficial to our statute books.

Increase in legislation, not only demands more time from legislators, but also greater skill. When statutes cover, not only forms of government, administration and procedure, but are concerned with the regulation of nearly every branch of human activity, their enactment requires wisdom of a high order. The ideal twentieth-century lawmaker should know, not only law in the narrow sense, but also engineering, science, medicine, sociology and business. An act regulating railroads may involve technicalities of railway engineering; it may profoundly affect the business of the country; it may occasion delicate questions of labor and capital, or it may concern the health of the public.

It is too much to expect that each legislator will be a lawyer, a doctor, an engineer, an economist and a business man. The situation, however, shows the importance of electing men of sufficient breadth of view to appreciate the responsibilities placed upon them and to use the technical knowledge of experts. The legislator cannot be both a doctor and an engineer, but he must be willing and able to turn to the doctors and engineers and use their knowledge.

One method whereby the legislators seek to obtain information which may aid them in their task is the creation of special investigation committees and general commissions. The new insurance laws of New York, which have been followed by a large number of states, were the result of the recommendations of the special legislative committee. The laws upon the same subject in Wisconsin, which are more far-reaching in their results than probably those of any other state, were recommended by a similar committee. In that state those laws followed, on the whole, the recommendations of this special committee, rather than the recommendations of the regular committees of the legislature.

Commissions whose duties are both administrative and advisory have been created in a number of states. The most frequent examples of these commissions are those concerned with the regulation of railroads and other public service corporations, or with taxation. Their duties are primarily administrative, although they are often required to submit recommendations to the legislature.

Their purely administrative work, however, is apt to be so large that little time is left for a systematic study of the subject and for the framing of recommendations. Their advice has undoubtedly been followed by the legislatures in a large number of cases. In some instances, however, the legislatures have disregarded their recommendations, the most noticeable case of this during the past year being the enactment of a two-cent fare law in Wisconsin, almost immediately following the finding of the Railroad Commission that such a rate would not allow a fair return to the railroads.

Except for the purposes of general statutory revision, the states have never adopted the idea of special commissions whose sole duty shall be to make recommendations upon legislation. Such commissions have been frequently advocated and their creation would in some cases probably be of material assistance to the legislators. It may be questioned, however, whether such a plan would meet with general approval, principally because of the concentration of power and influence in these special commissions. The legislature would usually desire only that facts upon a subject should be obtained for it, reserving to itself the question of the direction in which there should be legislative action.

The diversity between the states probably makes any exact uniformity in legislation undesirable. A law of Alabama cannot be adopted bodily in California, nor will the legislation of New York always bear transportation to Texas. Yet each state can benefit by the experience of the others and thereby gain both in time and knowledge. An inspection of the laws of the past year shows that there has been much of this borrowing. It does not appear, however, to have been done with intelligence. Too often the legislator, finding a law of another state covering his subject, takes it as his model without further consideration. No important legislation should be undertaken without full knowledge of what other states are doing, but this knowledge should include, not only the text of the law, but an appreciation of how the law worked in practice and of the construction given it by the judiciary. It is presumed that when a law is taken from another state the construction placed upon it by the courts of that state is also adopted. As far as this presumption is based upon an idea that the decisions construing the law thus adopted have been actually examined by the legislature it is largely a legal fiction.

The idea that legislators should be furnished with information which will enable them to act more intelligently has resulted in a few states in the establishment of legislative bureaus or libraries, whose object is to obtain information upon all questions pending before the legislature. One type is that found in Wisconsin, where a branch of the state library undertakes to collect materials upon all subjects of current legislative interest. These materials consist, not only of books, but of pamphlets, briefs, newspaper clippings, etc., the object being to present to the legislator information upon all sides of the question. Such a library must, if it is to fulfill its true function, be absolutely impartial. Those in charge must regard each bill without dislike or favor, and must gather all the materials, both for and against the proposition. The object of such bureau is not to argue or lobby for or against any measure, but to afford the facilities whereby the legislator may more intelligently consider the stand which he will take.

This sort of library is entirely different from the proposition which has been advanced for the establishment of a "People's Lobby." The object of this latter institution is not to present impartial information, but to decide what measures it believes are for or against the people's interests, and to take a stand for or against such measures and the legislators who favor or oppose them. The legislative bureau should be an impartial investigator, while the "People's Lobby" cannot lay claim to impartiality.

Another sort of work which is affording legislators information is that done by the Albany State Library. This consists in the indexing of all laws of general interest and the issuing of bulletins commenting upon legislation of each year. Such a work is supplemental to the work already described, such as is carried on by the Wisconsin library. Both are, if properly done, of the utmost importance in the improvement of legislation.

The modern idea is that all human activity is within the regulative sphere of the legislature. Whether it be for good or ill, the *laissez faire* doctrine in economics and politics has been abandoned. This modern theory places more demands upon the legislator. It takes more of his time as well as greater ability. If this universal regulation is to be successful, legislative standards must be raised, and broad men, who can use the results of modern investigation, must be chosen as legislators.

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NOTES.

THE ENTITY THEORY OF PARTNERSHIP UNDER THE BANKRUPTCY ACT OF 1898.—It is now settled that when Congress enacted in 1898 that "'persons' shall include partnerships," § 1 (19), and that "a partnership may be adjudicated a bankrupt," § 5a, it thereby made a partnership a legal entity. *In re Meyer* (1899) 98 Fed. 976; *In re Mercur* (1902) 116 Fed. 655, 658; aff'd. (1903) 122 Fed. 384. Thus, a firm may be declared bankrupt, though one member be a minor, *In re Dunnigan* (1899) 95 Fed. 428, or insane, *In re Stein & Co.* (1904) 127 Fed. 547, and it has even been held that the partnership proceedings and the partners' proceedings are distinct cases, requiring payment of separate fees in each. *In re Barden* (1900) 101 Fed. 553; contra, *In re Gay* (1899) 98 Fed. 870. Acts of bankruptcy by the firm and by the individual partners are clearly distinguished, *Hartman* v. *Peters & Co.* (1906) 146 Fed. 82, and the adjudication is made accordingly.

In re Hale (1901) 107 Fed. 432. In at least one reported case, the issue of the firm's solvency was confined to partnership assets and partnership debts. *In re McMurtrey & Smith* (1905) 142 Fed. 853; Burdick, Part. (2nd Ed.) 306. Merchants have always regarded the firm as something distinct from its members, Burdick, Part. (2nd Ed.) 156, but the Federal judges, schooled in the common-law conception of a partnership as merely an aggregation of individuals, ibid., 81—the doctrine recognized in the Bankruptcy Act of 1867 by § 36—found it difficult, especially at first, to apply the entity theory to all circumstances. This led to the view that a partnership ought not to be adjudicated bankrupt apart from any of its members, *In re Forbes* (1904) 128 Fed. 137, 139, and to theories whereby at least one partner might also be declared bankrupt. *Chemical Nat. Bank* v. *Meyer* (1899) 92 Fed. 896. Further to avoid the bankruptcy of merely the partnership entity, with all its difficulties, *In re Carleton* (1902) 115 Fed. 246, 249, the courts at this period held, in disregard of the entity theory, that a firm was insolvent only when its property, plus the individual property after the payment of individual debts, was less than its debts. *In re Blair* (1900) 99 Fed. 76. The reason given, that each individual partner as well as the firm was liable for partnership debts, *Vaccaro* v. *Security Bank* (1900) 103 Fed. 436, practically ignored the force of § 1 (15) and § 1 (19) of the Act, and the fact that a person is none the less insolvent if some one else is liable for his debts and able to pay them. Apparently, what underlay these decisions was the hidden fear lest a too strict application of the entity theory might result in merely distributing firm property among firm creditors, and then wiping the firm debts out of existence by a firm discharge, see *In re Pincus* (1906) 147 Fed. 621, 625—a conclusion clearly wrong but never called for by the entity theory under the statute. Accordingly, General Order VIII and Official Form No. 2 of the Supreme Court required the filing of individual schedules of the partners upon a voluntary petition in bankruptcy by a firm; this, however, is reconcilable with the entity theory on the ground that the schedules of the partners, like the examination of each of them by the creditors, are necessary for the proper administration of the partnership estate. In the leading case of *In re Meyer, supra*, the Circuit Court of Appeals for the Second Circuit, while deciding that proof of a partnership act of bankruptcy will not *per se* sustain the adjudication of an individual partner, first suggested the rule that an adjudication of the partnership entity nevertheless drew into the court of bankruptcy the administration of the estates of the individual partners, notwithstanding that there had been no individual adjudications. This dictum has been widely followed, especially in the Eastern Circuits. *In re Stokes* (1901) 106 Fed. 312. Recently, however, the Circuit Court of Appeals for the Eighth Circuit, in a case wherein a partnership had made a general assignment and had been adjudged a bankrupt, without any of the partners being adjudicated, held that the partnership trustee could not take nor administer the property of an individual partner. *In re Bertenshaw* (1907) 157 Fed. 363. The court, while recognizing contrary dicta and decisions in other circuits, placed its decision upon a logical analysis of the Act. An affirmance of this view by the

Supreme Court, settling the law in the other circuits in accord, would be desirable.

There is no express provision of the statute allowing individual property to be taken by the trustee upon a firm bankruptcy. § 5c does provide that "the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property," but this ought to be read with §§ 2 (1) and 32 and General Order VI, and its purpose is apparently to have the cases of the partnership and all the partners administered for the sake of convenience in one district. Collier, Bank. (6th Ed.) 82. As to partners not adjudicated, the power of the court certainly ought to go no further than jurisdiction of their persons to compel compliance with § 7 (Duties of Bankrupts). The statute, although considering the firm an entity for bankruptcy purposes even after dissolution, § 5a, nevertheless recognizes the common-law rule that the bankruptcy of a partner works for all other purposes a dissolution of the firm, Burdick, Part. (2nd Ed.) 343, and provides for the trustee's receiving the bankrupt's interest in the firm after liquidation and accounting by the non-bankrupt partner or partners; § 5h; but this does not by any implication give the trustee of the bankrupt partner the power to take the firm's property, *In re Mercur* (1903) 122 Fed. 384, nor that of the other partners. Cf. *Amsinck* v. *Bean* (1874) 22 Wall. 395. Similarly, there is no reason in allowing the property of a non-bankrupt partner to be taken upon an adjudication of the partnership entity.

On the other hand, wherever *In re Meyer, supra,* is followed, the distinction between acts of bankruptcy by the partnership and such acts by the partners, while still important upon the question of adjudication, *Hartman* v. *Peters & Co., supra,* becomes practically immaterial as to administration and discharge. *Dickas* v. *Barnes* (1905) 140 Fed. 849. Although both firm and individual property is thus taken and administered in the firm proceeding, the discharge, despite some dicta, seems never to have been granted to the firm only, but invariably to the individual partners. *In re Farley* (1902) 115 Fed. 359. Because of these decisions, and since in practice a firm is not likely to get into bankruptcy if any partner is solvent, it has become the most usual practice to adjudicate the firm and all the individual partners, *In re Forbes, supra; In re Grant Bros.* (1901) 106 Fed. 496, 498; Collier, Bank. (6th Ed.) 80, to marshal the assets of all and distribute them as provided by § 5f of the Act, and then to discharge the individual partners from firm and individual debts. *In re Meyers* (1899) 97 Fed. 757; *In re Gay, supra,* 872.

Many of the difficulties of the subject may be removed if we adopt the theory that the partnership and the partners are distinct legal persons as regards adjudication and administration, but that a discharge (even from partnership debts), to be of any effect, can be granted only to the individual partners. As the application for a discharge is substantially a separate proceeding, this rule would be convenient in its workings and logical in its results. If one member of a firm commits an individual act of bankruptcy, the other members may liquidate, § 5h, and firm creditors can be

paid so far as possible in the liquidation proceedings. They may also prove their claims against the bankrupt, *In re Bates* (1900) 100 Fed. 263, although they cannot receive any dividend until after the individual creditors have been paid in full; § 5f; *In re Wilcox* (1899) 94 Fed. 84; *In re Janes* (1904) 133 Fed. 912. The discharge is, according to the best authority, a valid bar to partnership and individual obligations. *N. Y. Institution* v. *Crockett* (N. Y. 1907) 117 App. Div. 269; 7 COLUMBIA LAW REVIEW 272. On the other hand, if the firm commits an act of bankruptcy, the partnership entity is adjudicated "a bankrupt," § 5a; the partnership creditors elect the trustee, § 5b [for § 5h seems applicable only to the bankruptcy of a partner when the firm is not declared a bankrupt, *In re Harris* (1900) 4 Am. B. R. 133; Collier, Bank. (6th Ed.) 87]; the partnership assets are collected, and the partnership debts are paid. The discharge of the partnership entity would be a nullity, *Chemical Nat. Bank* v. *Meyer, supra,* 899; *In re Forbes, supra,* 140, for the partners, whether regarded as co-debtors with their firm, or as quasi-sureties for its debts, would still be liable by virtue of § 16. The result would be much like the bankruptcy of a corporation whose stockholders are under a statutory liability for its debts. See § 4b. The net result of a partnership bankruptcy, then, would be an administration of its estate; the partners must then either pay off what remains of its indebtedness, or if unable to do so become voluntary bankrupts; or the partnership creditors, who are their individual creditors also, may cause them to be adjudicated involuntary bankrupts. *Matter of Hee* (1904) 13 Am. B. R. 8.

DISPOSITION OF ACCUMULATIONS UNDER NEW YORK STATUTES.—In determining the person to whom, as "presumptively entitled to the next eventual estate," the rents and profits of realty or the income of personal property should belong where they were undisposed of, and no valid direction for their accumulation was given, 1 R. S. 726, § 40; Laws 1896 c. 547, § 53; 1 R. S. 773, § 2; Laws 1897 c. 417, § 2; *Cook* v. *Lowry* (1884) 95 N. Y. 103; and see 7 COLUMBIA LAW REVIEW 403, the court in *Manice* v. *Manice* (1871) 43 N. Y. 303, 385, said: "The statute does not say the ultimate, but the next eventual estate. That is, the estate which is to take effect upon the happening of the event which terminates the accumulation." Unless the word "presumptively" is to be nullified, and since the person presumptively entitled can take the accumulations at once as they accrue, *Manice* v. *Manice, supra,* 385; *Matter of Crossman* (1889) 113 N. Y. 503, "the presumption must be determined as of the present moment, i. e. the court must decide who would take the next eventual estate if the contingency happened now." 7 COLUMBIA LAW REVIEW 403. Where there is one contingency only, and where, assuming it to happen now, no supposition need be indulged in favor of one of several adverse claimants of the next eventual estate, there is no difficulty in determining the person presumptively entitled. *Manice* v. *Manice, supra; Pray v. Hegeman* (1883) 92 N. Y. 508; *Delafield* v. *Shipman* (1886) 103 N. Y. 463; 7 COLUMBIA LAW REVIEW 403; and see *Cochrane* v. *Schell* (1894) 140 N. Y. 516. If, however, the determination of the person entitled depends upon a choice

between the positive and negative aspects of a contingency, other than the event which terminates the accumulation, and between persons *in esse*, it would seem that no "presumption" should be indulged and that the accumulations should pass to the next of kin under the Statute of Distributions. See *U. S. Trust Co.* v. *Soher* (1904) 178 N. Y. 442. Suppose property is left in trust to pay a fixed annual sum out of the income to A for life, and upon his death the corpus to go to B if he is unmarried at that time; if not, then to C. Logically, of course, in assuming A's death at the present moment, one should assume also that B will be unmarried at A's death as he is now. Thus the difficulty, *supra*, could be avoided, but practically there is an unfair discrimination between living persons having equal contingent claims to the expectant estate. This may have been the basic idea of the decision in *U. S. Trust Co.* v. *Soher, supra*, but if so, it is submitted that it was misapplied and that the real decision was a refusal to choose between two contingencies respectively terminating distinct accumulations, on the ground that a presumption of survivorship could not be indulged. See 7 COLUMBIA LAW REVIEW 403, where the case is discussed. Whether or not the courts will discriminate between living contingent remaindermen, *supra*, it seems clear that they will favor one *in esse* as against one not yet born, *Cook* v. *Lowry, supra;* and see *Kilpatrick* v. *Johnson* (1857) 15 N. Y. 322; *Haxtun* v. *Corse* (1848) 2 Barb. Ch. 506, except, perhaps, in a case where the application of the rule would work great injustice and violate the testator's intention. *U. S. Trust Co.* v. *Soher, supra.*

A more difficult and unusual case is presented when there are two events, the happening of either of which will terminate the accumulation. If the *same* person or persons would be entitled to an estate upon either contingency, there would seem to be no objection to the assumption that either or both happen at the present moment, in determining the person or persons presumptively entitled. Thus, if there is a trust to pay a fixed annual sum out of the income to A so long as he remains alive and unmarried, the principal upon A's death or marriage to go to B if living, it is clear that B is the person presumptively entitled. Cf. *Matter of Crossman* (1889) 113 N. Y. 503. It may be, however, that upon the happening of each event *different* persons respectively will become entitled to an estate. In such a case, if the events are equally certain or uncertain to happen it is difficult to assume that one will occur before the other. See *U. S. Trust Co.* v. *Soher, supra.* But a choice may be made in favor of a person *in esse* if the alternative involves an assumption of the death of that person. Thus in *Pray* v. *Hegeman, supra*, in holding the children to be presumptively entitled, the court was forced to choose the uncertain event of each child attaining majority, and reject the uncertain event of each child dying under age. Cf. *Kilpatrick* v. *Johnson, supra.* On the other hand, if one of the events is certain to happen and the other uncertain, it would seem that the choice if any be made, should favor the certain event. In *Kilpatrick* v. *Johnson, supra*, the testator left a share of his personal property in trust for his daughter, A, for life, the income or principal to be applied to her support so far as actually necessary, (1) if her husband

died, or (2) if he was unable to support her; and on A's death the principal and interest were to be divided among her children. The court, per Denio, C. J., held that A's children *in esse* were presumptively entitled. This conclusion seems to involve a rejection of the first two uncertain events, upon the happening of either of which, A would be entitled to an estate, *Pray* v. *Hegeman, supra;* 7 COLUMBIA LAW REVIEW 403, and the choice of the certain one, i. e., A's death. Cf. *Pray* v. *Hegeman, supra.*

In striking contrast to this result is the decision of the Court of Appeals in the recent case of *St. John* v. *Andrews Institute for Girls* (N. Y. 1908) 83 N. E. 981. There a testator devised the residue of his estate to executors in trust to pay the income to his wife for life, and directed that upon her death a part of the residue should go to a charitable corporation to be formed by the executors within two lives in being, and declared that in case his intention with respect to the said institution for girls should because of illegality fail or become impossible of realization, the property should go to the Smithsonian Institute. The wife perished with the testator and the Andrews Institute was subsequently formed as directed. The question was as to who should take the undisposed of income which had accrued prior to the formation of the Andrews Institute. Clearly there were two events here, the happening of either of which would terminate the accumulation: (1) the dropping of the two lives, an event *certain* to happen, upon the happening of which the Smithsonian Institute, a person already *in esse,* would be entitled to an estate; (2) the formation of the Andrews Institute, an event not certain to happen, upon the happening of which a hitherto non-existing person, the Andrews Institute, would be entitled to an estate. In order to tell in whom, as presumptively entitled, the accumulations vested prior to the happening of either event, a choice must be made between the events and one must be assumed to have happened. Inasmuch as the first is certain and favors a person *in esse* it would seem that it should be chosen, if any choice is made. *Supra.* Accordingly, the Smithsonian Institute would be presumptively entitled and would not be divested by the subsequent formation of the Andrews Institute, assuming that the trust ceased upon that event, the Andrews Institute not being entitled to a "next" estate. 7 COLUMBIA LAW REVIEW 403, where the decision of the Appellate Division is discussed. If the choice favors the second event it prefers the uncertain to the certain, *supra,* disregards a person *in esse, supra,* and allows the Statute of Distribution to operate in default of a person in being to take as presumptively entitled, thus violating the intent of § 53, *supra,* to provide for all possible cases. 7 COLUMBIA LAW REVIEW 403; cf. 8 COLUMBIA LAW REVIEW 298. The objection that the proposed incorporation was never illegal or impossible of realization, of course falls with the assumption of the first event. However, the court held that "the event was the formation of the Andrews Institute," and that the accumulations should pass to the next of kin under the Statute of Distributions. This decision seems to lay down a new rule governing a choice between contingencies, making the intention of the testator decisive, and is hard to reconcile with the statement in *Manice* v. *Manice, supra,* that "The intent of the statute, and not of the testator must govern the disposition of this undisposed of fund."

VALIDITY OF A DEVISE OVER AFTER AN ESTATE WITH A PROVISO COMPELLING ALIENATION.—Devisees or bequests of "what is undisposed of" after the estate of the first beneficiary, are variously construed by the courts. 8 COLUMBIA LAW REVIEW 330. Whether the gift over is an executory devise after a fee, or whether a remainder after a life estate with power of disposal, is important since, by the weight of authority, in the latter form only is it valid. *Kent* v. *Morrison* (1891) 153 Mass. 137; *Kelley* v. *Meins* (1883) 135 Mass. 231; *Van Horne* v. *Campbell* (1885) 100 N. Y. 287. A contrary result was reached in a recent case in Texas, *Littler* v. *Dielmann* (1908) 106 S. W. 1137, conforming to prior decisions. 8 COLUMBIA LAW REVIEW 330. A gift over in case of remarriage, of what remained of a widow's absolute estate, was upheld as a valid executory devise. The reason given in *Ide* v. *Ide* (1809) 5 Mass. 500—which with *Jackson* v. *Bull* (1813) 10 Johns. 19, is the basis of the American decisions —for holding the executory limitation void, is that it is inconsistent with the absolute property in the first devisee: absolute because of the superadded power to dispose free from the limitation over. *Ide* v. *Ide, supra,* rests upon the authority of *Att'y Gen'l* v. *Hall* (1731) Fitz. 314; s. c., W. Kel. 13. There the devise (realty and personalty) was to H. and the heirs of his body, and if he should die leaving no heirs of his body, then so much of the property as he should be possessed of at death, to a charity. It was held that the will gave H. the absolute ownership of the personalty. This absolute ownership in H. resulted from the old rule that future estates, after a bequest of personalty, were not allowed, whether by way of remainder, *Anon.* (1641) March, 106, pl. 183, or by executory devise. Gray, Perpetuities (2nd Ed.) § 80. It did not result because of any inconsistency due to the limitation over. The court in *Ide* v. *Ide, supra,* evidently stumbled over the statement, "It is giving a man a sum of money to spend and limiting over to another what does not happen to be spent." Yet is this anything more than an interpretation of the provisions of the will from which the absolute property in H. was inferred? 2 Fearne, Cont. Rem. (4th Ed.) 227. The express power of disposal merely prevented the reading in by implication of a bequest of only the "use." Cf. *Hide* v. *Parrat* (1696) 2 Vern. 331. *Ide* v. *Ide, supra,* with its reason of "repugnancy" may be impeached on another ground. As shown in *Kelley* v. *Meins, supra,* the courts find nothing repugnant in the case of a life estate with power of disposal, remainder over of what is unspent. This repugnancy may possibly exist where there is an absolute bequest with a gift over upon the sole contingency of the first taker spending or not. But the latter is not the case of *Ide* v. *Ide, supra,* for there the expressed contingency was "dying without lawful heirs"; that event performs the precise function that the event of death of the life tenant does—it gives over the estate. In each case alike, the spending only measures the quantum of the estate over. The nature of the bequest over should make no difference. Cf. *Bohlman* v. *Lohman* (1885) 79 Ala. 63. In *Jackson* v. *Bull, supra,* Chancellor Kent gives a reason for holding the executory devise bad, different from that in *Ide* v. *Ide, supra.* His rule is that any executory devise depending upon a contingency which it is in the

power of the first taker to prevent happening, is void. In *Jackson* v. *Robins* (1819) 16 Johns. 537, he is more explicit: he recognizes that every such devise is to some extent dependent upon the will of the first taker, e. g., where the contingency is marriage, but distinguishes these cases as lying without the purview of his rule; it is the power to dispose of the property so as to free it from the burden of the devise over, and thus defeat that devise, which renders the latter void. This reason for his rule, like that in *Ide* v. *Ide, supra,* would logically destroy a remainder after a life estate with power of disposal, as well as an executory devise where the contingency is not the spending itself. In each alike, the power is destructive of the substance of the gift over. Chancellor Kent does not distinguish between tangible property and rights in property. See Digby, Real Prop. 304, n. 2. The sale destroys the former but not the latter. Otherwise a life tenant by exercising a power of sale, could defeat a vested remainder. [The power of disposal does not render the remainder contingent. *Burleigh* v. *Clough* (1872) 52 N. H. 267.] Not only is Chancellor Kent's reason unsound, but the rule itself. This latter fact Prof. Gray has clearly pointed out. Restraints on Alienation (2nd Ed.) § 69. An executory devise is, indeed, indestructible by the first taker. 2 Fearne, Cont. Rem. 51. That is, he cannot prevent the executory devise from vesting if the contingent event ever happens. But that does not mean that the contingent event itself may not be within his power.

In New York the Real Property Statutes recognize the existence of expectant estates which may be defeated by any act or means that the party creating them shall have authorized. 3 N. Y. R. S. 217 §§ 32, 33. *Greyston* v. *Clark* (1886) 41 Hun 125 and *Leggett* v. *Firth* (1889) 53 Hun 152 regarded these sections as validating executory devises of the kind above discussed, for the statute clearly applied. In the latter case on appeal, (1892) 132 N. Y. 7, the Court of Appeals said that the devise over was not void, even though defeasible by the first taker. It construed the first beneficiary's estate to be only a life interest upon the authority of *Terry* v. *Wiggins* (1872) 47 N. Y. 512. The latter case adopted the same construction, apparently on the ground that an executory devise would be void as repugnant. A strong dictum of the Court of Appeals in *Leggett* v. *Firth, supra,* repudiated this last result but ignored *Terry* v. *Wiggins* on this point. The latter case would seem to nullify the provision of the statute that expectant estates shall not be void because thus liable to be defeated. If correct, the statutes have left the old rule intact. The last decision is *Kelley* v. *Hogan* (1902) 71 App. Div. 343, where the first taker could dispose of the property not only by deed but also by will. It was held that in the face of such an absolute power of disposition the statute could not save the devise over. Such a distinction has no basis in the statute, and leaves the law in New York uncertain.

PROPERTY OF A NON-RESIDENT DECEDENT UNDER THE NEW YORK TRANSFER TAX ACT.—Legislatures in taxing the privilege of acquisition by will or inheritance, see 7 COLUMBIA LAW REVIEW 293, commonly include transfers from a non-resident decedent, of property within the State. Cf. N. Y.

Laws 1896, c. 908, § 220, 1; see *State* v. *Dalrymple* (1889) 70 Md. 294. Although such statutes are generally regarded as imposing a tax not on the estate but on the succession, *Matter of Swift* (1893) 137 N. Y. 77; *Matter of Merriam* (1894) 141 N. Y. 479; *Matter of Wolfe* (1903) 89 App. Div. 349; aff'd (1904) 179 N. Y. 599, it has been said that the assessment as to a non-resident's personalty cannot be on the succession; *Matter of Bishop* (1903) 82 App. Div. 115, since personalty passes by the law of the domicile. But as foreign law operates only by consent of the sovereign in whose territory the property has its actual situs, Story, Confl. of Laws, §§ 18, 550, the local transfer tax is really a condition precedent to the succession under the *lex domicilii*. That double taxation may result is no controlling objection. *Blackstone* v. *Miller* (1902) 188 U. S. 189; see *Greeves* v. *Shaw* (1899) 173 Mass. 205.

The earliest Transfer Tax Act in New York, Laws 1885, c. 483, was construed, by a divided Court, not to cover the personalty of a non-resident. *Matter of Enston* (1889) 113 N. Y. 174. The defect was cured by a change of phrase, Laws 1887, c. 713, § 1; *Matter of Romaine* (1891) 127 N. Y. 80, but it later appeared that adequate procedure had not been provided. *Matter of Embury* (1897) 19 App. Div. 214; aff'd (1897) 154 N. Y. 746. A line of decisions under the statute as next materially amended, however, at once established an aggressive interpretation. Thus, on the ground of the protection accorded either directly or to the ultimate assets represented, cf. *Callahan* v. *Woodbridge* (1898) 171 Mass. 595, 597, "property within the state" was construed to embrace certificates of stock of domestic corporations, though kept by the non-resident decedent at his domicile, *Matter of Bronson* (1896) 150 N. Y. 1; bonds both of foreign, *Matter of Morgan* (1896) 150 N. Y. 35, and of domestic corporations, if deposited in New York, *Matter of Whiting* (1896) 150 N. Y. 27, and a New York bank account. *Matter of Houdayer* (1896) 150 N. Y. 37. And the steady course of enactment and of interpretation has ever since been towards enlarging the scope of the statute. *Matter of Gordon* (1906) 186 N. Y. 471, 483. Contrast *Matter of Phipps* (1894) 77 Hun 325; aff'd (1894) 143 N. Y. 641, and *Matter of Clinch* (1905) 180 N. Y. 300, 302. Cf. *Matter of Daly* (1905) 100 App. Div. 373, aff'd (1905) 182 N. Y. 524.

This tendency is well illustrated by a recent Court of Appeals decision. *Matter of Ramsdill* (1908) 190 N. Y. 492. A resident of Massachusetts, dying intestate, left personalty both there and in New York. One group of distributees fell within the exemptions of the New York statute. 3 R. S. Tax Law, § 221. It was unanimously held that the Massachusetts administrator could not deprive the State of its *pro rata* tax on the succession of the non-exempt distributees, by paying them out of Massachusetts assets and applying the New York property wholly towards the satisfaction of the shares of the exempts. The theory was that the status both of the distributees and of the State under the Transfer Tax Act became fixed instantly at the intestate's death. See *Matter of Westurn* (1897) 152 N. Y. 93, 102. The various views to the effect that an intestate's personal estate is until the grant of administration in abeyance, *Brown* v. *Bibb* (Tenn. 1865) 2 Coldw. 434, 437; *McNearman* v. *Maxfield* (1882) 38 Ark. 631, 636,

or for certain purposes in the administrator by relation back, Com. Dig. Tit. Adm. B. 10; *Babcock* v. *Booth* (N. Y. 1842) 2 Hill 181; 1 Williams, Ex'rs. (7th Am. Ed.) 760, or in the custody of the law, *Bartlett* v. *Hyde* (1834) 3 Mo. 490, or more specifically, in the Probate judge, 21 & 22 Vict. c. 95, § 19, concern the immediate legal title, and under modern law at least, in no respect the beneficial interest. The ownership of the administrator is of course purely temporary and special. *Ledyard* v. *Bull* (1890) 119 N. Y. 62, 72; Schouler, Ex'rs & Adm'rs, § 242; Pom. Eq. Jur. § 1088. His legal title will not necessarily be enforced against the distributees, standing on their equitable rights, when there are no debts. *Richardson* v. *Cole* (1900) 160 Mo. 372. Friendly settlements without administration have been often upheld. *Babbitt* v. *Bowen* (1859) 32 Vt. 437; *Matter of Losee* (1907) 119 App. Div. 107. Some courts have even recognized a direct legal title in the distributees, loosely describing them as tenants in common. *Hyde* v. *Stone* (1831) 7 Wend. 354, 357; *Harrington* v. *Lowman* (1897) 22 App. Div. 266. A distributee's interest pending administration is subject to "trustee process," *Wheeler* v. *Wheeler* (Mass. 1838) 20 Pick. 563, and if he dies before distribution his share goes to his representatives. *Moore* v. *Gordon* (1867) 24 Ia. 158. Distribution merely ascertains rights which have already vested. *Kingsbury* v. *Scovill* (1857) 26 Conn. 349; *Perryman* v. *Greer* (1863) 39 Ala. 133. Although these rights do not attach to any specific property, cf. *Pritchard* v. *Norwood* (1892) 155 Mass. 539, a distributee takes a beneficial interest in the whole mass of personalty; that liquidation is the common practice does not mean that his interest is merely a claim for a sum of money. *Cooper* v. *Cooper* (1874) L. R. 7 Eng. & Ir. App. Cas. 53; cf. *Brown* v. *Bibb, supra.* It follows that in the principal case, at once upon the intestate's death, each distributee, exempt and non-exempt alike, took a *pro rata* interest in the New York personalty. Since the State's right to the transfer tax attached at the same instant, beyond the power even of the legislature to divest, *In re Lander's Estate* (Cal. 1907) 93 Pac. 202, the administrator's later apportionment could not affect the statutory liability.

The administrator's contention in the principal case had been granted below, without opinion, on the authority of *Matter of James* (1894) 144 N. Y. 6, where the executor was allowed to avoid the New York tax on a non-exempt legatee by similarly marshalling assets. The Appellate Division was unanimously reversed, on the ground of the "obvious distinction between testacy and intestacy." What that distinction may be does not appear. That the executor's title passes at once by the will and the administrator takes only by virtue of his later appointment, is immaterial. *Touchst.*, 474. The title of the former is as purely administrative as the latter's. *Lane* v. *Albertson* (1903) 78 App. Div. 607, 619. In general there is no difference between their rights, duties and powers. 1 Williams, *supra*, 775; *Shoenberger's Ex'rs.* v. *Savings Inst'n* (1857) 28 Pa. St. 459, 466; Redf., Surr. Pr. (6th Ed.) 515. Such differences as may exist, see 6 Columbia Law Review 15, concern their dealings with third parties, not the beneficiaries. See Minor, Confl. of Laws, § 116. And a general legatee, like a distributee, simply takes a *pro rata* share in the whole residual per-

sonal estate. Cf. *Kingsbury* v. *Chapin* (Mass. 1907) 82 N. E. 700, 702. That the State's right to the tax is fixed at the instant of death, as argued in the principal case, has been repeatedly held also where decedent was testate. Assessment may be made before probate. *People* v. *Barker* (1896) 150 N. Y. 52. The assignment of a residuary legacy to an exempt legatee before administration cannot change its taxability. *Matter of Cook* (1907) 187 N. Y. 253. Where a legatee died within three days of the testator, his share was notwithstanding subject to the tax. *Matter of Borup* (1899) 28 Misc. 474. The value at the testator's death, not that at the time of transfer of actual possession, controls the appraisal of a bequest. *Matter of Davis* (1896) 149 N. Y. 539; *Matter of Sloane* (1897) 154 N. Y. 109.

This discrepancy of result may best be explained by the advance in the Court's attitude towards the scope of the statute with respect to non-residents, since the date of *Matter of James, supra,* and in failing frankly to overrule that case the Court of Appeals, it is submitted, has observed a distinction between testacy and intestacy which seems unfounded in logic or justice. That no such distinction exists appears even to have been urged in an earlier decision under the statute by one of the judges concurring in the principal case. *Matter of Romaine, supra,* 85. Later adjudications may be expected to refine the present apparent difference. Such a disposition is indicated by the terms in which *Matter of James, supra,* is in the principal case expressly affirmed. Though the reported facts give no clear warrant for such interpretation, *Matter of James* is described as holding that the tax may be avoided where a *specific* legatee of a foreign testator can obtain satisfaction of his legacy in a foreign jurisdiction. Clearly, to exact through the executor a tax on a specific legacy of designated foreign property merely because unrelated portions of the same estate lie within the taxing State, would be in effect an exercise of sovereignty beyond the jurisdiction. A distinction between intestacy and testacy broadly, is unsound; but the application of the doctrine expressed in *Matter of James, supra,* to cases of specific legacies of foreign property is both logical and just. Such limitation will bring consistency, both in legal principle and in practical administration, into the inheritance tax law of New York.

Nature of Prescriptive Rights as Determined by User.—The rule that a prescriptive right is measured by the user in which it originated, Washburn, Easements (4th Ed.) 135, cannot be rigidly applied; *Cowling* v. *Higginson* (1838) 4 M. & W. 245; it considers the use as an entity, whereas, "user" is a composite, containing different elements. Manner of using is one of these; purpose, is another. It is necessary to determine how far each of these is a substantial element of the right, for only those which are essential elements are limitations upon the right, and the right (i. e. user) is variable as to the others. For example, the acts done by virtue of, or in acquiring the right, may vary to some extent within limits comprised within the general term "manner"; it is the "manner" which must remain identical. Another question is whether the right may not be measured by the manner alone or the purpose alone, and so be varied as to the absent element. To ascertain the scope of the right in each case, it

is necessary to determine how far each of these elements constituting user, may be varied.

In *Luttrell's Case* (1601) 4 Co. Rep. 86, the change of a fulling mill to a grist mill was held not to affect the prescriptive right to a flow of water, "provided no prejudice arise" by the change. This principle that the user may be changed if no greater burden is cast on the servient estate, is the basis of many cases. *Wimbledon etc. Conservators* v. *Dixon* (1875) 1 Ch. Div. 362; *Wright & Rice* v. *Moore* (1863) 38 Ala. 593, 597; *McIntyre Bros.* v. *McGavin,* L. R. [1893] App. Cas. 268, 274. But see *Hart* v. *Chalker* (1824) 5 Conn. 311, 316; *Hulme* v. *Shreve* (1837) 4 N. J. Eq. 116. How far this principle can be used as a working rule is uncertain, either in considering possible variations in a clearly defined prescriptive right, or in considering acts done during the prescriptive period. It is wholly inapplicable to certain classes of cases. Of these, perhaps the most conspicuous are cases of "rights for all purposes." Here, a user for a variety of purposes will prove a right for all: *Cowling* v. *Higginson, supra:* the jury may infer that the right existed to the general extent claimed if the actual right exercised was for all the purposes required by the use of the premises as the need arose. The right then, in part, has no complementary user. *Dare* v. *Heathcote* (1856) 25 L. J. Ex. 245. The right includes future user; as to that, assertion of right takes the place of user. Yet ordinarily a mere claim of right without user is ineffective. *Gibson* v. *Fischer* (1885) 68 Ia. 29, 36. In such a case, the element of purpose has disappeared, and the right may be varied as to that absent element. The burden may thus be increased. Again, the test of increased burden falls before the limitation found in these cases, that the dominant estate must remain substantially in the same condition: a way for agricultural purposes may not be used if the premises are changed into house lots. *Parks* v. *Bishop* (1876) 120 Mass. 340. But if, after alteration, the new purpose imposes no extra burden, the right should remain. *Sloan* v. *Holliday* (1874) 30 L. T. (N. S.) 757. Again this test fails in another class of cases, where a right of way for a special purpose, e. g., to get wood from a wood lot, is held to cease when the lot is changed. Washburn, Easements (4th Ed.) 136; semble, *Atwater* v. *Bodfish* (Mass. 1858) 11 Gray 150. In *Baldwin* v. *Boston etc. Ry. Co.* (1902) 181 Mass. 166, this is explained on the ground that "there is an actual change in the physical objects passing over the road." Surely, this is of no consequence; wood or farm products, the burden may be unchanged. This test, as an attempt to solve the extent of the permitted variation within the limits of any one of the general elements of user, is a failure. But the courts have never attempted to set up another.

Apart from the question of variation in user as governed by the essential elements of the right, the broader, fundamental question of what the user as a whole consists, must be determined. A right to drainage may be a right to maintain a drain adversely; then the right would be limited only by the capacity of the drain which would be usable for any purpose. Or the right may be only to dispose of certain sewage through the drain, and then, purpose and amount would fix the right. *Shaughnessy* v. *Leary* (1894) 162 Mass. 108. So in cases of dams. If the

capacity of the dam limits the right, there may be a wide variation in the actual amount of land flowed. The water may never be raised to the efficient height of the dam, because of waste, leaky condition, etc. Thus a serious increase of actual burden may be inflicted by subsequent repair or economical use. *Cowell* v. *Thayer* (Mass. 1843) 5 Metc. 253. These considerations have led some courts to reject this test of user and substitute the amount of land actually flowed. *Mertz* v. *Dorney* (1855) 25 Pa. 519; *Turner* v. *Hart* (1888) 71 Mich. 130; *Griffin* v. *Bartlett* (1875) 55 N. H. 119. In a recent New York case, *Bremer* v. *Manhattan Ry. Co.* (1908) 38 N. Y. Law Jour. No. 142, the court decided that the user of the plaintiff's easement of light and air was measured by the elevated structure as an entirety, and that an increase in the length and frequency of trains was immaterial. This is correct, if such user is regarded merely as a variation within the same manner of user.

An increased user for a portion of the prescriptive period will usually not affect such as has been continuous for the whole period. *Shaughnessy* v. *Leary, supra; Alcorn* v. *Sadler* (1893) 71 Miss. 634. So a gradual increase in user, though imperceptible, would be inefficient to give a right larger than the initial burden; likewise in the converse case, where there is a gradual decrease, e. g., where a dam constantly deteriorates. See *Stiles* v. *Hooker* (1827) 7 Cowen 266. Where there is a change in user, not a mere increase, the prescription will be interrupted and although some part is common to the two, no prescriptive right as to that part is gained unless it has a separate and severable existence. *Am. Bank Note Co.* v. *N. Y. etc. Ry. Co.* (1891) 129 N. Y. 252.

Power of a Corporation to Act in Chief.—The manifest inability of a purely legal entity to act *in propria persona* has led to the theory which is very uniformly laid down in the text books, that a corporation can perform no act except through an agent, Angell & Ames, Priv. Corps. (5th Ed.) § 224; 1 Spelling, Priv. Corps. §§ 174, 193, 420, the only exception being the vote of the assembled corporators. Angell & Ames, Priv. Corp. *supra.* Whether a given act is in chief or mediate becomes material where the act is required to be performed by the party in interest, or if performed through an agent, to be accompanied by different formalities. In *Bank of U. S.* v. *Danbridge* (1827) 12 Wheat. 64, it was decided that a board of directors acted as the agents of the corporation, and that their act was not that of the corporation in chief. That those acting for the corporation should be considered as, in a sense, the agents of the corporators, is comprehensible, although their powers be determined by the corporate charter, the corporators having only power to choose the persons who shall act. *Fleckner* v. *U. S. Bank* (1823) 8 Wheat. 338; *Dana* v. *Bank of the U. S.* (Pa. 1843) 5 Watts. & Serg. 223; *Burrill* v. *Nahant Bank* (Mass. 1840) 2 Met. 163; *Howland* v. *Myer* (1850) 3 N. Y. 290. But they are considered, not as the agents of the corporators, but of the corporation. *Dana* v. *Bank of the U. S., supra.* As the idea of an agent implies also a principal who is capable of controlling the agent, and as a person can do through an agent only that which he is legally capable of doing

himself, the conception of a purely legal entity, personally incapable of thought or will, acting through an agent, is as objectionable as the conception of such an entity performing a personal act.

While acknowledging that the acts were through an agent, acts of the duly appointed officers of corporations have been considered the equivalent of the personal acts of natural persons, from the necessity of the case, usually because corporations would be otherwise deprived of the benefit of statutes evidently intended to include them. *Trenton Bank* v. *Haverstick* (1829) 11 N. J. L. 171; *New Brunswick etc. Co.* v. *Baldwin* (1834) 14 N. J. L. 440; *Shaft* v. *Phœnix Mut. Life Ins. Co.* (1876) 67 N. Y. 544; *Modesto Bank* v. *Owens* (1898) 121 Cal. 223, 226. In the recent case of *Am. Soda Fount. Co.* v. *Stolzenbach* (N. J. 1907) 68 Atl. 1078, however, Mr. Justice Dill carefully considers the nature of the acts of officers of a corporation in its behalf, and maintains the power of a corporation to act immediately. The case arose under a statute requiring that when a chattel mortgage was recorded by an agent, an affidavit of authority should be attached. The vice-president of a mortgagee corporation recorded a mortgage without such affidavit. The recording was considered valid, as being the act of a corporation in chief, and not through an agent. The court drew a distinction between an agent and an agency. Admitting the inability of a corporation to act *in propria persona,* it considered it as an entity empowered to act through the instrumentality of natural persons, whose acts must be considered those of the corporation itself. In result, the case follows, and is supported by *Am. Insulator Co.* v. *Bankers' etc. Tel. Co.* (N. Y. 1885) 13 Daly 200; *Bank* v. *Hutchison* (1882) 87 N. C. 22. See also *Martin* v. *Atlas Estate Co.* (N. J. 1907) 65 Atl. 881. The agency through which the corporation acts was, however, considered as a merely mechanical instrumentality, as the hand of a man. This theory is open to the same objection as that of a corporation having an actual agent, in that it predicates a will in the corporate entity; an assumption which is contrary to fact, and which should not be made unless commanded by express legislation to that effect. If, however, the agency be conceived of not as a mere instrument, but as independent of a corporate entity, and whose will and acts are attributed to the latter in the same manner that the will of a guardian is attributed to an infant or of a committee to an insane person, and as the knowledge of such officers or agents is attributed to the corporation, the theory is entirely comprehensible and logical, and reaches the same result as under the other conception. But the doctrine would seem applicable only to those who are by statute invested with the corporate powers, and constitute the corporation for the purpose of dealing with others, see 1 Spelling, Priv. Corps. § 420, and not to those acting under delegated authority.

Negligence and Change of Position in Actions for Recovery of Money Paid by Mistake.—The basis of the action for the recovery of money paid under mistake of fact being equity and good conscience, the cause of the mistake is immaterial. *Appleton Bank* v. *McGilvray* (Mass. 1853) 4 Gray 518. On this reasoning, *Kelly v. Solari* (1841) 9 M. & W.

53, overruling a dictum in *Milnes* v. *Duncan* (1827) 6 B. & C. 671, 677, established the rule, now followed by the great weight of authority, that negligence by the plaintiff, except in certain special cases, *Price* v. *Neal* (1762) 3 Burr. 1354, does not bar a recovery. Mere means of knowledge by the plaintiff, therefore, since it simply shows negligence, is generally held no bar, *Rutherford v. McIvor* (1852) 21 Ala. 750; *Baltimore etc. R. R. Co.* v. *Faunce* (Md. 1847) 6 Gill. 68; contra, *Brummitt* v. *McGuire* (1890) 107 N. C. 351, but merely evidence from which the jury may infer actual knowledge. *Brown* v. *College etc. Co.* (1877) 56 Ind. 110, 115. An intentional refusal by the plaintiff to investigate, however, is equivalent to actual knowledge, and bars a recovery, since under such circumstances it cannot be said that the money was paid under mistake. *McKibben* v. *Doyle* (1896) 173 Pa. 579, 581. If the defendant cannot be put *in statu quo,* that is, if he has suffered an irrevocable change of position, the plaintiff cannot recover, *Walker* v. *Conant* (1877) 65 Mich. 194, unless the defendant's position has been due to his own negligence. *Union Bank* v. *U. S. Bank* (1807) 3 Mass. 74. While often loosely put on the ground of estoppel, this rule would really seem to rest on the lack of equity in the plaintiff's favor under such circumstances. For in most cases it is impossible to work out a representation upon which to ground an estoppel. *Lawrence* v. *American Nat'l Bank* (1873) 54 N. Y. 432. The plaintiff's negligence may consist either in making the mistake under which the payment was made, *supra,* or in failing to notify the defendant after its discovery. In the latter as in the former case, the controlling factor is the defendant's change of position caused by the plaintiff's negligence, though the courts usually place it on the ground of the plaintiff's "laches." This is confusing, for laches, properly pertinent only to questions of equitable relief, and then found only in cases where the defendant has been prejudiced, 6 COLUMBIA LAW REVIEW 578, will often bar the plaintiff upon proof of simple delay, the prejudice to the defendant being presumed, idem, whereas in an action of quasi-contract the defendant's change of position should always be proved and never presumed. *Third Bank* v. *Merchants' Bank* (N. Y. 1884) 76 Hun 475; *Wind* v. *Fifth Nat'l Bank* (1889) 39 Mo. App. 72; *Mayer* v. *Mayor* (1875) 63 N. Y. 455; contra, *Skyring* v. *Greenwood* (1825) 4 B. & C. 281.

It has been said that in England to-day irrevocable change of position by the defendant constitutes no defense, Keener, Quasi-Contracts, 61, and *Newall* v. *Tomlinson* (1871) L. R. 6 C. P. 405 is cited. In that case, A, on a debt due, overpaid B, under a mistake in adding weight lists. It was held that A could recover from B even though B had credited C, his undisclosed principal, with the amount on a debt the latter owed him, B. All the text writers state that the principal was insolvent, though this does not appear in the case and was not discussed by the court. Assuming this fact, however, it is submitted that the decision does not stand for the proposition cited, but is a result of the doctrines of agency involved in the case. If A, under a mistake, pays B, the agent of a disclosed principal, C, and B holds the money after notice of the mistake, A can recover from B just as he could if B paid the money to C after notice, *Elliott* v. *Swart-*

wout (U. S. 1836) 10 Pet. 137, because the agent's duty to pay over ceases when A notifies B and there is nothing in A's action to hold him to his first direction to B. It is evident that the question of whether B could recover from C, after and because of, a recovery by A from B, on the theory of reimbursement of an agent for expenses incurred in his master's business, is immaterial in determining whether A is barred from a recovery from B because of the change of position of B, for such an analysis would involve begging the very question at issue. Yet such seems to be the *ratio decidendi* of the authority cited *supra*, for insolvency of the principal is there considered a material fact. The test would seem to be whether, irrespective of a recovery by A from B, B could recover from C. It would seem that he could not. When B has paid C, he cannot recover, because, although B had the legal title, *Robertson* v. *Coleman* (1886) 141 Mass. 231, and thus was more than a mere custodian, he had no beneficial interest to the money. *Whitton* v. *Barringer* (1873) 67 Ill. 551; cf. *Planters' etc. Co.* v. *Tunstall* (1882) 72 Ala. 142. If, therefore, A could recover from B, when B has paid C before notification of the mistake, B would suffer a loss. The basis for denying a recovery by A from B is, therefore, the change of position on B's part by his payment over before notice. *Langley* v. *Warner* (1850) 3 N. Y. 327. Now where C is an undisclosed principal, the principles resulting in B's inability to recover from C are the same: the same change of position by B results. But by the doctrines of agency, A is entitled to regard B as a principal in all respects and may, therefore, recover from him. *Holt* v. *Ross* (1873) 54 N. Y. 472. This, however, is consistent with the general principles of quasi-contracts, for B by his own act of holding out has lost his right to plead his change of position. See *supra*. *Newall* v. *Tomlinson*, therefore is no exception to the general rule.

A recent decision, *Cunningham* v. *First Nat'l Bank* (Pa. 1907) 68 Atl. 731, illustrates a class of cases sometimes considered as another exception to the general rule. A bank paid a check on a forged indorsement and the drawer delayed for six weeks after discovering the forgery, to notify his bank, the defendant. It was held that as the bank that had first paid the check had failed and the defendant bank would thus be prejudiced by the delay, the drawer could not recover. The duty cast upon the depositor to examine his pass book and vouchers is well defined, its basis being recognized business usage. 2 COLUMBIA LAW REVIEW 490. There being thus a positive duty to speak, the failure to do so results in a representation grounding an estoppel, see idem, as to checks paid after a reasonable time for discovery has elapsed. This estoppel bars the plaintiff and hence the general rule that his negligence is immaterial is not impugned.

RECENT DECISIONS.

ALEXANDER B. SIEGEL, *Editor-in-Charge.*

ADMIRALTY—PILOTS—LIABILITY FOR NEGLIGENCE.—The acts of a pilot whom the vessel was under statutory duty to employ, resulted in a collision, though in operating the vessel he exercised his best judgment in good faith. *Held*, the pilot was answerable to the owners for all damages paid by them. *Guy* v. *Donald* (1907) 157 Fed. 527.

Although the owner of the vessel is not liable *in personam* for the negligence of one employed under a statute of compulsory pilotage, *Homer Ramsdell Transp. Co.* v. *Compagnie Générale Transatlantique* (1895) 63 Fed. 845; affd. (1901) 182 U. S. 406, the vessel was liable *in rem*, *The China* (1868) 7 Wall. 53, being regarded by the maritime law as a juridical person, capable of committing wrongs and liable for delinquencies. *Ralli* v. *Troop* (1894) 157 U. S. 386, 403. The obvious practical basis for thus impressing an admiralty lien is the desire to furnish a certain security of indemnity to the injured party. Although the pilot's liability is not that of an insurer, *The Garfield* (1884) 21 Fed. 474, his failure to exercise the degree of skill commonly possessed by others in that employment is a maritime tort, *Sideracudi* v. *Mapes* (1880) 3 Fed. 873, and renders him in turn liable over to the vessel despite the *bona fide* exercise of his best judgment. *Donald* v. *Guy* (1903) 127 Fed. 228.

BANKRUPTCY—PARTNERSHIP—TRUSTEE'S POWER TO TAKE PROPERTY OF NON-BANKRUPT PARTNER.—A partnership, as such, was adjudicated bankrupt. *Held*, its trustee could not take the individual property of a partner who was not bankrupt in order to pay partnership debts. *In re Bertenshaw* (1907) 157 Fed. 363. See NOTES, p. 391.

CARRIERS—SPECIAL CONTRACT—NOTICE WITHIN THIRTY DAYS.—The defendant moved to dismiss an action for damage to freight on the ground that the plaintiff had failed to prove compliance with a provision of the bill of lading which required notice within thirty days. *Held*, such notice was not a condition precedent to recovery but was matter of defence. *Hoye* v. *Penn. R. Co.* (N. Y. 1908) 83 N. E. 586.

It is generally conceded that a requirement of notice of injury to freight is valid, though it limits the carrier's liability for negligence, since it prevents fraud upon him and places no burden on the shipper. *Express Co.* v. *Caldwell* (1874) 21 Wall. 264, 268; cf. 6 COLUMBIA LAW REVIEW 597; contra, by statute, *Grieve* v. *Illinois etc. Ry.* (1898) 104 Ia. 659; by constitution, *Brown* v. *Illinois etc. Ry.* (1897) 100 Ky. 525. But if the period within which notice is required is unreasonably short, see Hutchinson, Carriers, 3rd Ed., § 443; *Queen of the Pacific* (1900) 180 U. S. 49, 55, a substantial compliance is sufficient, *B. & O. Express Co.* v. *Cooper* (1889) 66 Miss. 558; *Louisville etc. Ry.* v. *Landers* (1902) 135 Ala. 504; contra, *Cox* v. *Central etc. R. R.* (1898) 170 Mass. 129, 138 (holding notice dispensed with). If the shipper sues on the carrier's common law liability, the burden of proving that the damage arose from an exemption therefrom is on the carrier, *Schaeffer* v. *Phila. etc. R. R.* (1895) 168 Pa. St. 209, and the same reasons of policy would seem to apply where the suit is on the special contract made to protect him, *Western etc. Co.* v. *Newhall* (1860) 24 Ill. 466; contra, *The Westminster* (1904) 126 Fed. 608, though the requirement might well be construed on strict contract principles as a condition precedent. *Kalina* v. *R. R. Co.* (1904) 69 Kan. 172. Thus the carrier must plead the special contract, *Westcott* v. *Fargo* (1875) 61 N. Y. 514;

Kansas etc. R. Co. v. *Page* (1901) 69 Ark. 256; contra, *Kalina* v. *R. R. Co., supra,* or the recovery will be on the common law liability. Consequently the rule of the principal case is correct.

CONSTITUTIONAL LAW—CLASS LEGISLATION—BOTTLING ACTS.—A penal statute forbade the use, without the owner's written consent, of registered bottles or boxes employed in the sale and handling of merchandise, food or beverages, authorizing recovery thereof by search warrant. *Held,* the act was unconstitutional. *State v. Schmuck* (1908) 77 Oh. St. 128.

A statute is not invalid as class legislation, if it is based upon reasonable grounds, is reasonably related to the object to be accomplished, and affects alike all persons similarly situated. 8 COLUMBIA LAW REVIEW 318. Laws safeguarding property peculiarly in need of protection, such as mechanics' lien laws, *Barrett* v. *Millikan* (1901) 156 Ind. 510, boarding-house keepers' lien laws, see *Barnett* v. *Walker* (N. Y. 1902) 39 Misc. 323, or facilitating the prevention of fraud or imposition, such as acts protecting union labels, *Tracy* v. *Banker* (1898) 170 Mass. 266; *Perkins* v. *Heert* (1899) 158 N. Y. 306, are valid; and it would seem that the legislation in the principal case protecting property especially liable to fraudulent misuse is constitutional. *Commonwealth* v. *Anselvich* (1904) 186 Mass. 376; *People* v. *Cannon* (1893) 139 N. Y. 32; contra, *Horwich* v. *Laboratory* (1903) 205 Ill. 497. The terms of the statute are broad enough to include all persons similarly situated. The search warrant clause, however, is clearly unconstitutional, such warrants being unavailable to maintain private rights. *Robinson* v. *Richardson* (Mass. 1859) 13 Gray 454; *Lippman* v. *People* (1898) 175 Ill. 101. Their use is confined to public prosecution for the detection, *Stone* v. *Dana* (Mass. 1842) 5 Met. 98, and prevention of crime. *People* v. *Noelke* (N. Y. 1883) 29 Hun 461. The decision in the principal case may be sustained on this ground, though not on the ground of unwarranted class legislation.

CONTRACTS—ILLEGALITY—CORRUPTION OF AGENT.—The plaintiff sued to recover the purchase price of goods sold to the defendant whose buyer was receiving a commission of five per cent. on all purchases from the plaintiff. Penal Code § 384r made the taking and the giving of such commission misdemeanors. *Held,* two justices dissenting, no action lay, although the defendant retained and used the goods. *Sirkin* v. *Fourteenth St. Store* (1908) 108 N. Y. Supp. 830.

The transaction cannot be looked on as an entire contract so as to bring it within the rule that when part of an entire consideration is illegal, the contract is unenforcible; *Gerlach* v. *Skinner* (1885) 34 Kan. 86; *Brieske* v. *Ry. Co.* (1898) 82 Ill. App. 256; for the contract of commission was made with the agent as individual, independent of the principal contract. But cf. *Standard Lumber Co.* v. *Butler Ice Co.* (1906) 146 Fed. 359. Nor was it necessary, as demanded by a common though inaccurate test, to rely on the illegal contract to establish the right on the principal contract. Chitty, Contracts, 657 et seq. When the direct inducing cause of a contract is illegal this prevents recovery whether executory, or executed on one side. *State* v. *Cross* (1888) 38 Kan. 696; Bishop, Contracts, 2nd Ed., § 470; 7 COLUMBIA LAW REVIEW 618. But at common law a commission contract was illegal, as designed to inflict a tort on the principal; *Grant* v. *Gold Exploration Co.* (1899) 69 L. J. Q. B. 150; and yet the principal contract was not void, but voidable as for fraud. *Smith* v. *Sorby* (1875) 3 Q. B. D. 552. The remedies of the principal were to rescind, *Panama & S. Pacific Tel. Co.* v. *India Rubber Co.* (1875) L. R. 10 Ch. 515, to recover from the agent in quasi-contract the amount of the commission, *Mayor* v. *Lever* (1891) 1 Q. B. D. 168, and to recover from the agent and the seller jointly and severally any damages sustained by reason of the fraud. *City* v. *Simmons* (1890) 150 Mass. 461. Since, therefore, at common law the commission contract though illegal was not

considered an inducing cause so as to render the principal contract void, how the fact that it is now criminal can make it such is unclear; and the principal case thus seems incorrect. *City* v. *Pertz* (1895) 66 Fed. 427; cf. *Cody* v. *Dempsey* (1903) 86 App. Div. 335; *Sinnott* v. *German Am. Bank* (1900) 164 N. Y. 386; contra, semble. *Standard Lumber Co.* v. *Butler Ice Co., supra.*

CONTRACTS—NON-CONTRACTUAL OFFER—TORT LIABILITY.—The defendant, a newspaper, conducted a financial advice column inviting inquiries from readers. The plaintiff wrote requesting the name of a good stock broker, which the defendant furnished without proper investigation. The plaintiff forwarded funds to the broker who misappropriated them. *Held*, the plaintiff's letter created a contract for the breach of which, in the failure to use due care, the defendant was liable. *De Le Bere* v. *Pearson, Limited* [1908] 1 K. B. 280.

To constitute an offer, a statement must evince an intention on the part of the offerer to assume a new legal liability. *Harvey* v. *Facey* [1893] A. C. 552. Thus a mere advertisement is generally not an offer, *Spencer* v. *Harding* (1870) L. R. 5 C. P. 561, nor a statement of intention to act in a certain manner. *Harris* v. *Nickerson* (1873) L. R. 8 Q. B. 286. The principal case can hardly be sustained on the ground of contract. It might, however, be supported on the ground of tort. Generally the giving of gratuitous advice and the innocent misrepresentation of a fact will, in the absence of contract, create no liability, because there is ordinarily an affirmative intention that the matter shall not be capable of having legal effect. *Shiels* v. *Blackburne* (1789) 1 H. Bl. 158; *Fish* v. *Kelly* (1864) 17 C. B. N. S. 194. Where this intention does not exist, one assuming a gratuitous obligation is under no duty to perform, since, otherwise, a contract liability would in effect be imposed without consideration; *Thorne* v. *Deas* (1809) 4 Johns. 84; but if performance is undertaken, there is a duty of care owing to one who is induced to rely thereon. *Gill* v. *Middleton* (1870) 105 Mass. 477. So in the principal case, while there was no *animus contrahendi*, neither were the relations of the parties such that they might be presumed to have waived any legal consequences which would ordinarily attach to their acts.

CONTRACTS—OUSTING COURTS OF JURISDICTION.—After recovering judgment against the defendants, the plaintiff, for a valuable consideration, promised not to sue thereon in New York, but in Russia, if at all. *Held*, the agreement was valid. *Gitler* v. *Russian Co.* (1908) 108 N. Y. Supp. 793.

In accordance with the well-settled rule that agreements withdrawing future controversies from the jurisdiction of the courts are illegal as obstructing the course of justice, *Ins. Co.* v. *Morse* (1874) 20 Wall. 445; *Miles* v. *Schmidt* (1897) 168 Mass. 339, stipulations to refer such disputes to arbitration, *Kill* v. *Hollister* (1746) 1 Wils. 129; *Trott* v. *Ins. Co.* (1860) 1 Cliff. 439; *Wood* v. *Humphrey* (1873) 114 Mass. 186, to sue in a specified county, *Nute* v. *Ins. Co.* (Mass. 1856) 6 Gray 174; contra, *Greve* v. *Ins. Co.* (N. Y. 1894) 81 Hun 28, or state, *Reichard* v. *Ins. Co.* (1862) 31 Mo. 518, in a certain port, *Shipping Co.* v. *Lehman* (1889) 39 Fed. 704, in a foreign court, *Slocum* v. *Assurance Co.* (1890) 42 Fed. 235, or to refrain from suing in the federal courts are invalid. *Doyle* v. *Ins. Co.* (1876) 94 U. S. 535; contra, *Mittenthal* v. *Mascagni* (1903) 183 Mass. 19. But agreements to refer some preliminary matter, e. g. the mode of fixing damages, are unobjectionable, since they deny a resort to the courts only until such condition precedent is fulfilled. *Canal Co.* v. *Coal Co.* (1872) 50 N. Y. 250; *Scott* v. *Avery* (1856) 5 H. L. Cas. 811. On the other hand, agreements limiting the right to sue in specific civil controversies or upon existing obligations, *Ins. Co.* v. *Morse, supra*, operate as a bar to any subsequent suit, *Armstrong* v. *Masten* (N. Y. 1814) 11 Johns. 188; *Ry. Co.* v. *Harris* (1890) 126 Ind. 7, forbearance or promise to forbear suit being

universally regarded as a good consideration, *Goodman* v. *Simonds* (1857) 20 How. U. S. 343, 370, unless public interests intervene, *Clark* v. *Spencer* (1875) 14 Kan. 398 (agreement to withdraw a plea of usury); *Amestoy* v. *Transit Co.* (1892) 95 Cal. 311 (agreement not to prevent a public nuisance). The principal case, founded on the distinction between present and future controversies, seems correctly decided.

COPYRIGHT — INFRINGEMENT — MUSICAL COMPOSITION. — The complainant owned copyrights of certain songs of which the defendants had prepared and sold perforated records for use in automatic pianos. *Held,* these records were not "copies" within the meaning of the statute, U. S. R. S. § 4952, so as to infringe on the plaintiff's copyrights. *White-Smith Music Pub. Co.* v. *Apollo Co.* (1908) 28 Sup. Ct. 319.

This decision of the Supreme Court finally determines that the legislative enactments on which alone copyright after publication rests, *Wheaton* v. *Peters* (1834) 8 Pet. 591, do not protect the collocation of sounds but only their expression in musical notation. This interpretation, as indicated in 5 COLUMBIA LAW REVIEW 615, accords with what little authority there is in point; and, though narrow, seems forced on the court for want of a more rational test capable of definite application. Since the records in the principal case are mere adjuncts of the valve mechanism, and not intended to be read, the conclusion necessarily followed. The result reached, however, is obviously unfortunate and demands prompt legislative extension of the scope of protection. See concurring opinion of Holmes, J.

CORPORATIONS—EFFECT OF DISSOLUTION ON LEASEHOLDS.—The plaintiff granted to a limited company a seven-year lease on which the defendant was surety. The corporation was dissolved and the plaintiff sued for rent subsequent to its dissolution. *Held,* the plaintiff could not recover. *Hastings Corporation* v. *Setton* (1907) 77 L. J. K. B. 149.

Dicta of old writers, 1 Blackstone 484; cf. Co. Lit. 13b, have stated the rule at common law to be that, on dissolution of a corporation, its land reverts to the donor, the debts due to and from it are extinguished, and its personal chattels go to the Crown: but this rule was of doubtful validity when made, Gray, Perpetuities, §§ 46-51; cf. *Naylor* v. *Brown* (1673) Finch 83; 2 Harv. L. Rev. 165, and except as to goods and chattels, *In re Higgins & Dean* (1899) 68 L. J. Q. B. 198, has not been applied to business corporations in England. As to debts and contracts the rule has been disregarded in America, cf. *Mumma* v. *Potomac* (1834) 8 Pet. 281, 286; contra, *Fox* v. *Horah* (N. C. 1841) 1 Ired. 358, and questioned in England. *In re Higgins, supra.* A leasehold anomalously partakes of the nature of realty, of chattels, and of a contract. In recent English cases the leaseholds of a dissolved corporation have by implication been held not to revert to the donor: *In re General Acc. etc.* (1904) 73 L. J. Ch. 84; *In re Bamore Road* [1906] 1 Ch. 359; cf. *Pryce-Jones* v. *Williams* [1902] 2 Ch. 517; cf. *In re Taylor's Agreement etc.* (1904) 73 L. J. Ch. 557: *Pryce-Jones* v. *Williams, supra,* indicating that they went to the Crown as *bona vacantia,* and *In re Bamore Road, supra* (based on an unreported case decided as to freeholds), holding that the title was suspended till a trustee was appointed. Cf. *In re General Acc. etc., supra.* The principal case disregards these decisions, ignores the analogy to goods and chattels or contracts, and blindly accepts the rule as to the reversion of freeholds and applies it to leaseholds. The analogy of leasehold to contract probably would not have aided in reaching a result, since it is not settled whether the dissolution works an entire extinction of contractual rights or only of remedies. Though in violation of the theoretical difference, the principal case proceeds on the practical similarity between leaseholds and realty.

CORPORATIONS—POWER TO ACT IN CHIEF.—By statute, an affidavit of authority was required to be attached when a chattel mortgage was recorded by

an agent. The vice-president of a mortgage corporation recorded a mortgage without such affidavit. *Held*, that the recording was valid, as the corporation was acting, not through an agent, but in chief. *Am. Soda Fount. Co.* v. *Stolzenbach* (N. J. 1907) 68 Atl. 1078. See NOTES, p. 403.

CRIMINAL LAW—INTERPOSITION IN DEFENSE OF THIRD PARTIES.—A attacked B, the brother of C, with a deadly weapon, B's insults having provoked the quarrel. C, interposing, killed A. *Semble*, C might kill A, though B, who was at fault, could not. *Warnack* v. *State* (Ga. 1908) 60 S. E. 288, 291.

A stranger, in preserving the peace, must act impartially, 1 East P. C. 289, 290; *Barfoot* v. *Reynolds* (1734) 2 Stra. 953, and, though he may kill one committing a violent felony, 1 Whart. Crim. Law, §§ 494, 495; cf. *Stanley* v. *Com.* (1887) 86 Ky. 440; *Glover* v. *State* (1894) 33 Tex. Crim. Rep. 224, the homicide will be justifiable only if necessarily committed. *People* v. *Cole* (N. Y. 1857) 4 Park. Crim. Rep. 35. If the intervener is a relative, his acts are construed as those of a partisan, 1 Hale P. C. 484, and he may use no more force than could the person attacked. *State* v. *Brittain* (1883) 89 N. C. 482; *Smith* v. *State* (1900) 105 Tenn. 305; contra, *State* v. *Linney* (1873) 52 Mo. 40. The assailed, if at fault, 1 Hale P. C. 479, 482; *State* v. *Hatch* (1896) 57 Kan. 420; 3 COLUMBIA LAW REVIEW 526, and, by the weight of authority, though innocent, *Allen* v. *U. S.* (1896) 164 U. S. 492; *State* v. *Rheams* (1885) 34 Minn. 18, must retreat to the wall before killing. Whart., Hom. § 485; see *State* v. *Gardner* (1905) 96 Minn. 318. Thus, under the foregoing rules, in the principal case, a stranger might kill A to prevent B's murder, while B, not having retreated, could not himself take life, nor, if the rule be strictly applied, could C, his brother. To give a stranger, under such circumstances, the right to kill, and withhold it from a relative, appears unreasonable. It would seem that the public interest in the prevention of felonies would be best conserved by allowing a relative the same rights as a stranger.

DOMESTIC RELATIONS—SURVIVORSHIP OF HUSBAND—MARRIED WOMAN'S POLICY ON HUSBAND'S LIFE.—A married woman took out a policy on the life of her husband, payable to herself or her legal representatives. She predeceased him, leaving children surviving. Her will made the husband sole legatee. *Held*, the policy was payable to the wife's representatives; Woodward, J., dissenting, on the ground that, since the wife died intestate as to the policy, it went to the husband as survivor. *Poole* v. *New England Mutual Life Ins. Co.* (1908) 108 N. Y. Supp. 431.

At common law, the husband was entitled for his own benefit *jure mariti*, to administer his wife's estate and reduce her choses in action. 2 Kent Comm. 135; *Squib* v. *Wyn* (1717) 1 P. Wms. 378. If he died after taking out administration, his personal representatives succeeded to his rights. *Whitaker* v. *Whitaker* (N. Y. 1810) 6 Johns. 112. He could not, however, sue without administration, *Grosvenor* v. *Lane* (1741) 2 Atk. 180; and if he failed to take out letters, his representatives obtained no rights, *Betts* v. *Kimpton* (1831) 2 B. & Ad. 273, but the representatives of the wife would hold in trust for the representatives of the husband. *Cart* v. *Rees* (1718) 1 P. Wms. 381; *Whitaker* v. *Whitaker, supra.* Though later statutes enabled the wife to hold separate property and dispose thereof by will, the common law rule prevailed in case of intestacy. *Ransom* v. *Nichols* (1860) 22 N. Y. 110; *Kenyon* v. *Saunders* (1894) 18 R. I. 590. This sole beneficial right of the husband is, however, inconsistent with modern statutes of distribution. See N. Y. Code Civ. Proc. §§ 2732, 2734; *Heirs of Holmes* v. *Adm'r of Holmes* (1856) 28 Vt. 765; *Baldwin* v. *Carter* (1845) 17 Conn. 201. In the principal case, therefore, though the attempted disposal by will was invalid, issue being left surviving, Laws of N. Y. 1896, Chap. 272, § 22; semble, *Bradshaw* v. *Mutual Life Ins. Co.* (1907) 187 N. Y. 347, the policy was payable to the wife's administrator. A contrary view would contravene one purpose of the statute, the protection

of the children. See *Eadie* v. *Slimmon* (1862) 26 N. Y. 1. *Olmsted* v. *Keyes* (1881) 85 N. Y. 593 is distinguishable, since the wife died prior to the enactment of the statute of distributions.

EQUITY—INJUNCTION AGAINST CRIMINAL PROSECUTIONS.—The plaintiffs sought to enjoin the defendant, the Attorney General of Arkansas, from prosecuting them under a statute making it a misdemeanor to deal in "futures," and from interfering with their contract with the defendant Telegraph Company. *Held*, the court could not enjoin criminal proceedings. *Logan & Bryan* v. *Postal Tel. & Cable Co.* (Ark. 1908) 157 Fed. 570.

It is the general rule that equity will not enjoin a criminal prosecution, *In re Sawyer* (1887) 124 U. S. 200; *Kerr* v. *Preston* (1876) L. R. 6 Ch. D. 463, as there is a remedy at law, *Phillips* v. *Mayor* (1878) 61 Ga. 386; *Hemsley* v. *Myers* (1891) 45 Fed. 283; *Stuart* v. *Supervisors* (1876) 83 Ill. 341; see also *Davis* v. *A. S. P. C. A.* (1878) 75 N. Y. 362, and this remedy cannot be waived so as to force the court of equity to decide. *Yates* v. *Batavia* (1875) 79 Ill. 500. Two exceptions to this rule exist. Where the equitable proceedings are ancillary, the same parties and the same right being involved in each suit, the criminal proceedings may be stayed. *York* v. *Pilkington* (1742) 2 Atk. 302; *Harkrader* v. *Wadley* (1898) 172 U. S. 148; *Saull* v. *Browne* (1874) L. R. 10 Ch. A. 64. Where irreparable injury will be inflicted on property rights through a void law an injunction will issue to restrain its enforcement. *Dobbins* v. *Los Angeles* (1904) 195 U. S. 223; *Mobile* v. *L. & N. Ry. Co.* (1887) 84 Ala. 115. The court usually passes on the validity of the law, *Canal Co.* v. *Lee* (1892) 2 Colo. App. 184; *Davis* v. *Fasig* (1890) 128 Ind. 271; *So. Exp. Co.* v. *Mayor* (1902) 116 Fed. 756; *C. R. R. of N. J.* v. *Penn. Ry. Co.* (1879) 31 N. J. Eq. 475, 493, and allows an injunction to prevent multiplicity of suits, *Poyer* v. *Des Plaines* (1887) 123 Ill. 111; *Denver* v. *Beede* (1898) 25 Colo. 172, although some courts require previous adjudication of invalidity as a condition of relief. *Cohen* v. *Commissioners* (1877) 77 N. C. 2; *Wallach* v. *Society* (1876) 67 N. Y. 23. The principal case recognizes and follows the rule and its exceptions. See also 6 COLUMBIA LAW REVIEW 345.

EQUITY—TAXPAYER ENJOINING GOVERNMENTAL OFFICER.—A city's census was fraudulently padded so that saloons could be operated. The plaintiffs, taxpayers, petitioned for injunctive relief to correct the census. *Held*, that the relief should be granted. *Semmes* v. *Needles* (Ia. 1908) 114 N. W. 304.

The principle that an injunction is granted only to protect property rights does not apply when the government, state or federal, requires the assistance of equity in the performance of its duties; *In re Debs* (1894) 158 U. S. 564; *Att. Gen.* v. *Ry. Cos.* (1874) 35 Wis. 425; *People* v. *Tool* (1905) 35 Colo. 225; see 7 COLUMBIA LAW REVIEW 357; and there is authority that a taxpayer also may enforce public rights, when his pecuniary interests are threatened. 1 Spelling, Injunctions, § 614; *Jorger* v. *Township* (1872) 36 Ia. 175; *Territt* v. *Town of Sharon* (1867) 34 Conn. 105; contra, *Doolittle* v. *Supervisors* (1858) 18 N. Y. 155 [but see, *Ayers* v. *Lawrence* (1874) 59 N. Y. 192, which construes statutory remedy now given to taxpayers]. But a resident since he has no pecuniary interest is not entitled to relief. *Caruthers* v. *Harnett* (1886) 67 Tex. 127. To allow a taxpayer to interfere by injunction with the workings of the government when his interest is not pecuniary would seem to promise too great a degree of uncertainty and disorganization ever to be justified.

EVIDENCE—CHARACTER—PROOF BY SPECIFIC ACTS.—In an action by an administrator to set aside a contract made by his testator with the defendant, a niece, and to compel restitution of property transferred on the grounds of

mental incompetency and undue influence, the defendant claimed that she was a favorite of her uncle. The plaintiff, having shown without objection that the testator, who had known the defendant intimately for many years, had said that he disliked her because "she is always in trouble with somebody," submitted, in corroboration, evidence of specific acts of ill-temper and quarrelsomeness by the defendant when the testator was not present. *Held*, the evidence was admissible. *Curtice* v. *Dixon* (N. H. 1907) 68 Atl. 587.

Admitting that the character of the niece was admissible in evidence in the principal case as being relevant to the issue and not evidentiary of the doing of any act in litigation, *Tompkins* v. *Starr* (1884) 41 Oh. St. 305, the question remains as to how it may be proved. Excepting the characteristics of inanimate objects and the traits of animals, the sole species of *facta probanda* in the nature of character which may be evidenced by specific acts is the incompetency of an employee in an action against an employer, *Morrow* v. *St. Paul City Ry. Co.* (1898) 74 Minn. 480; *Continental Match Co.* v. *Swett* (1898) 61 N. J. 457, which evidence tends also to show knowledge on the part of the employer. *Pittsburg etc. Ry. Co.* v. *Ruby* (1871) 38 Ind. 294. This so-called negligent or careful disposition, although allowed to be proved by specific acts in a rare case outside the class above, *Plummer* v. *Onipee* (1879) 59 N. H. 55, is not easily distinguishable from habit, 1 Wig. Ev. § 65, has been held to be provable by specific acts only, *Park* v. *R. R. Co.* (1898) 155 N. Y. 215, and, in view of the familiar and inflexible rule requiring proof of character by evidence of general reputation, seems not to furnish an exception to sanction the holding in the principal case.

INTERSTATE COMMERCE—SHERMAN ACT—STRIKES.—The complaint alleged that the plaintiffs, hat manufacturers, had an extensive interstate trade, and that the defendants had effectively combined to interfere with their production by strikes, and to boycott dealers in their products in other states. *Held*, on demurrer, that a cause of action was stated under the Sherman Anti-Trust Act. *Loewe* v. *Lawlor* (U. S. 1908) 28 Sup. Ct. 301.

Mere production is not commerce within the meaning of the Constitution. Cf. *U. S.* v. *E. C. Knight Co.* (1894) 156 U. S. 1. Though an agreement to restrict production might substantially affect commerce through the operation of economic causes, it would seem to be without the control of Congress, since too indirect an interference. Cf. *U. S.* v. *E. C. Knight Co., supra; Addyston Pipe & Steel Co.* v. *U. S.* (1899) 175 U. S. 211; *Anderson* v. *U. S.* (1898) 171 U. S. 604. Recent decisions show a tendency to regard the potency of the effect as an important element in determining jurisdiction, *Northern Securities Co.* v. *U. S.* (1904) 193 U. S. 197; *Swift* v. *U. S.* (1905) 196 U. S. 375; *Montague* v. *Lowry* (1904) 193 U. S. 38, but it is doubtful whether such a test would be applied where the result is accomplished only through the mediate channel of production. In the two cases last cited, provisions of the agreement in respect of intrastate commerce were restrained on the ground that, in addition to their being inseparably bound up with other provisions affecting interstate commerce, they were parts of a scheme of which restraint of interstate trade was the general purpose. See 5 COLUMBIA LAW REVIEW 388. If intention is a test, and intention is to be determined by natural and probable consequences, it is difficult to see any limits to the control of Congress. Logical adherence to this or any other rule is unlikely. To hold a strike among employees in a productive industry of itself a violation of the act would carry the reasoning of the most drastic cases to an extreme. The decision in the principal case is, however, justifiable on the basis of a boycott in interstate sales, thus falling within the authority of well settled cases; *Montague* v. *Lowry, supra;* though in the present unsettled condition of the law, each application to a new set of facts marks an advance.

MUNICIPAL CORPORATIONS—LACHES.—For nine years the plaintiff, a city, made no claim to taxes which were collected within its boundaries by the county to which it was entitled by its charter. *Held*, the city was barred by laches. *City of Sanford* v. *Orange County* (Fla. 1908) 45 So. 479.

Succeeding to the privilege of the king not to be barred by lapse of time, Bac. Abr., Prerog., E. 6, the state, unless a nominal party, *U. S.* v. *Beebe* (1887) 127 U. S. 338, is not barred by laches. *U. S.* v. *Insley* (1888) 130 U. S. 263; *U. S.* v. *Hoar* (1821) 2 Mason 311; contra, *Hepburn's Case* (Md. 1830) 3 Bland 95, 111. This immunity it possesses that the public interests may be secured against the negligence of officials. *U. S.* v. *Hoar, supra.* Since a municipal corporation acting for the public is granted the same exemptions as the state, 7 COLUMBIA LAW REVIEW 290; *Hennessy* v. *New Bedford* (1891) 153 Mass. 260, laches should not be attributed to it in the assertion of a public right. *Check* v. *City of Aurora* (1882) 92 Ind. 107; *Cross* v. *Morristown* (1867) 18 N. J. Eq. 311; Dill., Mun. Corp., 4th Ed., § 675; contra, *City of Wheeling* v. *Campbell* (1877) 12 W. Va. 36; *Simpson* v. *Stoddard Co.* (1902) 173 Mo. 421. Many courts have attempted to avoid this rule because of possible injustice to individuals losing sight of the sound public policy on which it is based, and have sought to apply the doctrine of estoppel. 8 COLUMBIA LAW REVIEW 143. These cases are unsatisfactory as there appear neither the representation nor the reliance upon it which are essential to make out an estoppel, *Ackerman* v. *True* (1903) 175 N. Y. 353, so that laches would seem the real ground of decision. These cases evince an indefinite tendency to relieve against the negligence of a municipal corporation, but they, with the principal case, seem unsound in barring a municipality in the assertion of a public right. *Logan County* v. *City of Lincoln* (1876) 81 Ill. 156.

MUNICIPAL CORPORATIONS — POWERS — WATERWORKS — TAXATION.—A city erected waterworks to supply itself and its inhabitants with water. *Held*, such property was exempt from taxation under a statute providing for exemption of public property devoted to public purposes. *Commonwealth* v. *City of Covington* (Ky. 1908) 107 S. W. 231.

While it is suggested that provisions for a water supply are more properly subjects of private enterprise, Abbott, Municipal Corporations, § 455, the courts have universally granted municipal corporations the right to provide water, as well as light, for their own use; *David* v. *Portland Water Course* (1886) 14 Ore. 98; *Livingston* v. *Pippin* (1858) 31 Ala. 542; and they may also incidentally supply their citizens, *Kane* v. *The Mayor* (1859) 15 Md. 240; cf. *Crawfordsville* v. *Braden* (1891) 130 Ind. 149, this being frequently justified as a valid exercise of the police power. *Ellinwood* v. *City of Reedsburg* (1895) 91 Wis. 131; *Crawfordsville* v. *Braden, supra.* Property so used is everywhere considered as being employed for a public purpose; *Warner* v. *Town of Gunnison* (1892) 2 Colo. App. 430; *Smith* v. *Inhabitants of Lincoln* (1898) 170 Mass. 488; and, in accord with the principal case, not subject to taxation. *Smith* v. *Nashville* (1889) 88 Tenn. 464; *West Hartford* v. *Board of Water Comrs.* (1877) 44 Conn. 360; *City of Rochester* v. *Town of Rush* (1880) 80 N. Y. 302.

PERSONAL PROPERTY—SELF-HELP.—The rafts of the plaintiff, a logging company, threatened the defendant's bridge, the repair of which temporarily obstructed the stream. To avert injury the defendant cut the rafts causing loss to the plaintiff. *Held*, the defendant could not thus destroy property to save his own. *Meadows* v. *Gulf etc. Co.* (Tex. 1908) 107 S. W. 83.

Self-help may be exercised in defense of property to prevent a threatened unlawful injury, *Aldridge* v. *Wright* (1873) 53 N. H. 398, which legal process would be ineffectual to avert, *Graves* v. *Shattuck* (1857) 35 N. H. 257, where the comparative values are not unreasonably disproportionate, *Morse* v. *Nixon* (N. C. 1873) 6 Jones L. R. 293, 296; *Russell* v. *The Mayor* (N. Y. 1845) 2 Denio 461, 488, or where a nuisance is shown. *Toledo etc. Ry. Co.* v. *Loop* (1894) 139 Ind. 342. Logging companies using navigable streams are liable for injuries they occasion either by

negligence or unreasonable use, *Coyne* v. *Miss. etc. Lumber Co.* (1898) 72 Minn. 533; *Hunter* v. *Lumber Co.* (1901) 39 Ore. 448; *Lumber Co.* v. *Keel* (1899) 125 Ala. 603; *Outterson* v. *Gould* (N. Y. 1894) 77 Hun 429, and are held to have constructive notice of lawful obstructions. *The Echo* (1884) 19 Fed. 453. As in the principal case the bridge repairing was a lawful obstruction, *Nav. Co.* v. *Chesapeake etc. Co.* (1888) 88 Ky. 1, the threatening of the bridge was unlawful since it would have been unreasonable if with actual knowledge. The principal case seems, therefore, unsound in denying the defendant his right of self-help.

PLEADING AND PRACTICE—STATUTE OF LIMITATIONS—EFFECT OF DISABILITY IN REAL ACTIONS UNDER NEW YORK CODE.—The cause of action accrued in 1878. The infant became of age in 1881. Suit was brought in 1899. *Held*, the action was not barred. *Muller* v. *Manhattan Ry. Co.* (1908) 108 N. Y. Supp. 852.

Section 375, N. Y. Code Civ. Proc., applying the statute of limitations to persons under disabilities, provides that "the time of such disability is not a part of the time limited * * * for commencing the action * * * except that the time so limited cannot be extended more than ten years after the disability ceases." The construction of this troublesome section as laid down by a line of decisions in the Court of Appeals, *Howell* v. *Leavitt* (1884) 95 N. Y. 617; *Darrow* v. *Calkins* (1897) 154 N. Y. 503; *Brown* v. *Doherty* (1906) 185 N. Y. 383, may be summarized as follows: (1) The infant is entitled to twenty years after majority unless this period gives more than thirty years after the accrual of the cause of action; (2) in such case, thirty years after the accrual of the cause of action; but (3) if the latter period fails to give ten years after majority, then ten years after majority. The intention of § 375, *supra*, apparently is to give the infant at least ten years in which to commence the action. A simpler rule, fully effecting this intention, would give the infant twenty years from the accrual of the cause of action and in case that period terminated within ten years after majority, then ten years after majority. Concurring opinion of Laughlin, J., *Taggart* v. *Manhattan Ry. Co.* (1907) 109 N. Y. Supp. 38. Such a rule would accord with the rule in personal actions. *Matter of Rogers* (1897) 153 N. Y. 316; *Hyland* v. *N. Y. & H. R. R. R. Co.* (N. Y. 1897) 24 App. Div. 417. The principal case follows rule (1) *supra*.

QUASI-CONTRACTS—RECOVERY OF MONEY PAID BY MISTAKE.—A bank paid a check on a forged indorsement and the drawer delayed for six weeks after discovering the forgery to notify his bank. *Held*, as the bank that had first paid the check had failed and the defendant bank would thus be prejudiced by the delay, the drawer could not recover. *Cunningham* v. *First Nat'l Bank* (Pa. 1907) 68 Atl. 731. See NOTES, p. 404.

REAL PROPERTY—EASEMENTS—VARIATION IN USER.—The plaintiff's property abutted the defendant's elevated railway structure. An action for damages occasioned by an alleged excess of user consisting, *inter alia*, of an increase in the length and frequency of trains, was brought. *Held*, the user was measured by the elevated structure as an entirety, and that the variation was immaterial. *Bremer* v. *Manhattan Ry. Co.* (1908) 38 N. Y. Law Jour., No. 142. See NOTES, p. 401.

REAL PROPERTY—EASEMENT OF SUPPORT—DAMAGES FOR DEPRECIATION.—The removal of minerals by the owner of the subjacent stratum, caused a subsidence of the soil of the surface owner, resulting in serious injury to his mills. *Held*, damages would not be allowed for depreciation in market value because of apprehension of future injury. *West Leigh etc. Co.* v. *Tunnicliffe* (1907) 77 L. J. Ch. 102.

The right of a surface owner to support was formerly held an absolute right to support as such, *Nicklin* v. *Williams* (1854) 23 L. J. Exch. 335, but is now settled in England to be merely an incident to the general right of an owner to the ordinary enjoyment of his land. *Backhouse* v. *Bonomi* (1861) 9 H. L. C. 502; contra, *Noonan* v. *Pardee* (1901) 200 Pa. St. 474.

The physical injury resulting from subsidence, not the failure to leave sufficient supports, creates the cause of action. *Mitchell* v. *The Darley etc. Co.* (1884) 53 L. J. Q. B. 471; affirmed (1886) L. R. 11 App. Cas. 127; *Church etc.* v. *Paterson etc. R. R. Co.* (1901) 66 N. J. L. 218; contra, *Noonan* v. *Pardee, supra.* Though future losses may be the direct consequence of the existing excavation, since the latter is not of itself a legal injury, it logically follows that damages may not be given for such apprehended losses. Hence, present depreciation in market value, depending, as it does, upon the prospect of future injury, cannot be considered in assessing damages.

SALES—WAREHOUSE RECEIPTS—DELIVERY OF POSSESSION—MISTAKE AS TO LOCATION OF GOODS.—In a bargain and sale the warehouse receipt for a bale of cotton was transferred and the contract price paid. Without the knowledge of either party the cotton had previously been surrendered by the warehouseman to a stranger. *Held,* on tendering the warehouse receipt, the buyer might recover the purchase money. *Livingston* v. *Anderson* (Ga. 1907) 58 S. E. 505.

The transfer of a bill of lading operates as a delivery of the goods designated. *Sanders* v. *MacClean* (1883) 11 Q. B. D. 327, 341. Other documents of title, however, are generally regarded merely as tokens of authority to receive possession, delivery not being effected until the bailee has attorned to the assignee. *Farina* v. *Home* (1846) 16 M. & W. 119; *M'Ewan* v. *Smith* (1849) 2 H. L. Cas. 309; *Keeler* v. *Goodwin* (1873) 111 Mass. 490. But many American jurisdictions treat warehouse receipts like bills of lading in this respect; *M'Neil* v. *Hill* (C. C. 1865) 1 Woolw. 96; *Davis* v. *Russell* (1878) 52 Cal. 611. By issuing a receipt the warehouseman consents in advance to become bailee for any *bona fide* holder. *Durr* v. *Hervey* (1884) 44 Ark. 301. See Burdick, Sales, 2nd Ed., § 272. But inasmuch as the warehouseman in the principal case never had possession of the cotton at any time while the vendee held the receipt, no bailment in the buyer's favor could arise. See Van Zile, Bailments, § 19. And since the warehouseman did not attorn to the buyer after the transfer, under the older view of warehouse receipts also the vendor has failed to perform his engagement to deliver possession. *Buddle* v. *Green* (1857) 27 L. J. Exch. 33; cf. *Salter* v. *Williams* (1841) 2 M. & Gr. 650. Accordingly, in absence of evidence, such as a custom, that the acceptance of a receipt discharged the seller's whole undertaking, *Whitlock* v. *Hay* (1874) 58 N. Y. 484, the buyer may sue on the breach of contract or rescind and reclaim the contract price. *Winside Bank* v. *Lound* (1897) 52 Neb. 469. Recovery, in a quasi-contract action, of the amount paid has been allowed in a similar case on the ground that the mutual mistake as to the location of the goods was so fundamental as to prevent the formation of a valid contract. *Ketchum* v. *Catlin* (1849) 21 Vt. 191. Cf. *Michel* v. *Ware* (1874) 3 Neb. 229.

STATUTES—MECHANICS' LIENS—LIBERAL CONSTRUCTION.—Portable machinery was purchased to fit up an empty building as a factory. *Held,* Ingraham, J., dissenting, the machinery set up constituted an "improvement" entitling the contractor to a mechanics' lien under the liberal construction provided for in the mechanics' lien law. *Griffin* v. *Ernst* (1908) 108 N. Y. Supp. 816.

Mechanics' liens are creatures of statute, the terms of which must be examined to ascertain whether a lien may be given. Sec. 3, Laws of 1897 Chap. 418, indicates that material to be protected by a lien must be intended for annexation so as to become a part of the realty. *Spruhen* v. *Stout* (1881) 52 Wis. 517; *Sears* v. *Wise* (1900) 52 App. Div. 118. Thus the general principles of the law of fixtures should determine the existence of a lien. *Baker* v. *Fessenden* (1880) 71 Me. 292; *Dimmick* v. *Cook Co.* (1897) 115 Pa. St. 573; see 2 COLUMBIA LAW REVIEW 407. The machinery in the principal case, being removable at pleasure is not a fixture and should not properly be the subject of a mechanics' lien. Sec. 22, Laws of 1897

Chap. 418, providing for "liberal construction" so that "a substantial compliance" shall be sufficient, would seem to indicate that liberal construction should be used only in aid of defects of practice and not, as in the principal case, to extend the substantive law. See 27 Cyc. 20; *Shaw* v. *Young* (1895) 87 Me. 271; *Turridy* v. *Wright* (1895) 144 N. Y. 519, 522.

SURETYSHIP—DISSOLUTION AND APPEAL BONDS.—The plaintiff, having sued A, attached property which was released by a dissolution bond given with B as surety. After judgment A appealed and the defendant with B's consent became surety on an appeal bond. The plaintiff released B and sued on the appeal bond. *Held*, the release of B discharged the defendant's liability. *Day* v. *McPhee* (Col. 1908) 93 Pac. 670.

A bond given to dissolve an attachment stands in lieu of the attached property, and a surety thereon is liable for any judgment rendered. *Jayne's Ex'r's* v. *Platt* (1890) 47 Oh. St. 262; *Sutro* v. *Bigelow* (1872) 31 Wis. 527. Sureties on appeal and dissolution bonds are not co-sureties, and one or the other is primarily liable. *Hartwell v. Smith* (1864) 15 Oh. St. 200. Where the appeal bond is taken without the consent of the dissolution bond surety, the last in time is primarily liable, *Chrisman* v. *Jones* (1879) 34 Ark. 73, but a surety on an appeal bond executed with the consent of the prior surety is subrogated to the rights of the creditor on the dissolution bond. *Hartwell* v. *Smith, supra.* While a creditor need not first proceed against the principal, *Babbitt* v. *Finn* (1879) 101 U. S. 7, nor exhaust collateral save where special circumstances exist, *Hayes* v. *Ward* (1819) 4 Johns. 123, a release by the creditor of collateral to which the surety may be subrogated, releases the surety *pro tanto. Cullum* v. *Emanuel* (1840) 1 Ala. 23. The plaintiff's release of B in the principal case would, therefore, release the defendant, since, on payment of his obligation, he would be subrogated to the creditor's rights against B.

TAXATION—NEW YORK TRANSFER TAX ACT—PROPERTY OF NON-RESIDENT DECEDENT—TESTACY AND INTESTACY.—A resident of Massachusetts, dying intestate, left personalty both there and in New York. The New York Transfer Tax Act, Tax Law, § 220, Subd. 2, sets a tax on all transfers by will or intestate law from a non-resident decedent, of property within the state. One group of distributees fell within the exemptions of the statute. Id., § 221. *Held*, the Massachusetts administrator could not deprive the State of New York of its *pro rata* tax on the succession of the non-exempt distributees, by paying them out of Massachusetts assets and applying the New York property wholly toward the satisfaction of the shares of the exempts. *Matter of Ramsdill* (1908) 190 N. Y. 492. See NOTES, p. 398.

TRUSTS—ACCUMULATIONS—DISPOSITION UNDER NEW YORK STATUTES IN CASE OF INVALID DIRECTION.—A testator devised the residue of his estate upon trust to his executors to pay the income to his wife for life, and directed that upon her death a part of the residue should go to a charitable corporation to be formed by the executors within two lives in being, and declared that in case his intention with respect to the said institution for girls should because of illegality fail or become impossible of realization, the property should go to the Smithsonian Institute. The wife perished with the testator and the Andrews Institute was subsequently formed as directed. The question was as to who should take the undisposed of income which had accrued prior to the formation of the Andrews Institute. *Held*, that it passed to the next of kin under the Statute of Distributions. *St. John* v. *Andrews Institute for Girls* (N. Y. 1908) 81 N. E. 981. See NOTES, p. 394.

TRUSTS—AUTHORITY OF SUBSTITUTED TRUSTEE—DISCRETIONARY POWERS.—A will creating a trust gave to the designated trustees, who later resigned, a discretionary power to sell the trust *res* and apply it to the use of the *cestui*. The plaintiff, a substituted trustee, attempted to exercise the

power. *Held*, Ingraham and Houghton, JJ., dissenting, the power being personal to the trustees named did not pass to the plaintiff. *Smith* v. *Floyd* (1908) 108 N. Y. Supp. 775.

It was originally held that wherever a discretionary power was given by a testator, he thereby indicated a personal confidence in his appointee's judgment and it did not pass to a substituted trustee. Vin. Abr., tit. Char. Uses C. 16; *Cole* v. *Wade* (1809) 16 Ves. Jr. 27. Later cases hold that the exercise of discretion is not the test but that such powers pass as are given *ex officio* and appear to attach to the office rather than to the incumbent. *In re Smith* [1904] 1 Ch. 139; *Crawford* v. *Forschaw* [1891] 2 Ch. 261; *Safe Deposit Co.* v. *Sutro* (1892) 75 Md. 361; contra, *Edwards* v. *Maupan* (D. C. 1888) 7 Mack. 39; *Belote* v. *White* (Tenn. 1857) 2 Head. 703. Moreover, the question being one of the construction of a will the intention of the testator should be controlling. See Farwell, Powers 457. The testator may fairly be presumed to know of the court's power to appoint new trustees, see Code Civ. Proc. § 2808, and in the absence of a clearly expressed contrary intention to have intended the power to pass. *Sawtelle* v. *Withams* (1896) 94 Wis. 412. In the principal case no such contrary intention being present the decision seems unsound on principle and authority. *Wilson* v. *Pennock* (1856) 27 Pa. St. 238; *Seels* v. *Delagado* (1904) 186 Mass. 25, and irreconcilable on any sound reasoning with previous New York decisions. *Lahey* v. *Kortright* (1892) 132 N. Y. 450; *Matter of Wilkin* (1905) 183 N. Y. 104.

TRUSTS—PERPETUITIES IN NEW YORK—LIMITATIONS OF SEPARATE ESTATES.—The testator by trust deeds in his lifetime had created a trust of personalty for the life of A; by his will he disposed of the reversion in trust for the lives of B and C. A was alive at the testator's death. *Held*, the testamentary trust was valid. *N. Y. Life Ins. & Tr. Co.* v. *Cary* (1908) 191 N. Y. 33.

The trust of the reversion, because of the already existing suspension, would seem to contravene the provision that "the absolute ownership of personal property shall not be suspended by any limitation or condition for a longer period * * * than two lives in being * * * at the death of the testator." Pers. Prop. L. § 2. The court rests on the proposition that an expectant estate can be dealt with in the same manner as an estate in possession; Real Prop. L. § 49; but it has never been assumed that a legal life estate in possession preceding a reversion suspended by a trust for two lives can itself be suspended in trust. To reach its result the court must assume the different and incorrect proposition that a reversion may be dealt with as though an absolute fee. The authorities cited are distinguishable: both the dictum in *Genet* v. *Hunt* (1889) 113 N. Y. 158, 168, and the *ratio decidendi* of *Livingston* v. *N. Y. L. Ins. & Tr. Co.* (1891) 13 N. Y. Supp. 105 (which, however, contains dicta in accord), assume a suspension of the remainder after the former suspension had terminated. A rejection of the principal case would, where the legal estate is divided among several, permit the one who first suspended his estate to preclude the others from putting theirs in trust. But the rule laid down permits the creation of perpetuities; since the process of cutting into the reversion could be infinitely continued, thus allowing new limitations for lives not in being when earlier and still existing estates were created; and this novel interpretation would be applicable to realty. *Manice* v. *Manice* (1871) 43 N. Y. 303, 382. The situation results from the adoption of the suspension of alienation theory of perpetuities; since, where the Rule deals with remote vesting, the limitation of the reversion cannot bring a prior limitation of a particular estate within the Rule.

WILLS—EXECUTORY DEVISES OF WHAT REMAINS.—A will gave the testator's property to his wife absolutely; in case of her marriage so much as had not been consumed, to vest in his children. *Held*, on the marriage the property vested in the children, as the executory devise was valid. *Littler* v. *Diemann* (Tex. 1908) 106 S. W. 1137. See NOTES, p. 397.

BOOK REVIEWS.

CHARLES S. BULKLEY, *Editor-in-Charge.*

LEGAL ESSAYS. By JAMES BRADLEY THAYER. Boston: The Boston Book Co. 1908. pp. xvi, 402.

Every reader of this modest volume will lay it down with regret that its author did not publish more. This regret will be deepened by learning that, at the time of his death, Professor Thayer was actively at work on a second volume on evidence, which was to have been similar in form to the Preliminary Treatise, but "of a more immediately practical character, giving a concise statement of the existing law of evidence"; and that he had planned also to publish a volume on Constitutional Law resembling the Preliminary Treatise on Evidence in its form and general scope. That such publications would have been eagerly welcomed and highly prized by the legal profession cannot be doubted.

The unfortunate meagerness of Professor Thayer's published work is explained by one of his Harvard colleagues in these words: "Mr. Thayer was fastidious, not in judging what others had done, for he was a generous and kindly critic, but in passing upon his own work. To discover or verify a fact which might make his material more complete, to arrange and rearrange that material so that its expression might be more perspicuous, no time or trouble seemed to him too great. But though the pages which he wrote cut no great figure, when measured by the base modern standard of so many thousand words, their quality is high."

The most important essays, in the volume before us, relate to constitutional law; and, as the editor remarks, contain much of the material which would have gone into the proposed treatise on that subject. We may well believe that the first essay—on The Origin and Scope of the American Doctrine of Constitutional Law—would have needed little if any recasting for service as the opening chapter of such a treatise. Certainly, in connection with the valuable notes, made up of extracts from other writings of the author, by the editor of this volume, it presents an admirable view of the peculiarities of our constitutional law.

It is highly probable that many a reader will find himself unable to accept all of the author's doctrines, but every reader will be impressed with the cogency of his reasoning and the general sanity of his judgment. Indeed, a dissenter, if also fair minded, will be apt to rise from the perusal of such an essay as that on Legal Tender, with a keener appreciation of the writer's ability and soberness and fairness than a disciple.

Professor Thayer is not a controversialist, but he never hesitates to express his opinion of what seems to him a legal heresy; nor to defend with vigor his own views, when assailed. His retort is always courteous, and yet its keenness is quite as marked as its urbanity. He never wields the big stick, but an opponent who lays himself open to a rapier thrust is sure to feel its sting. The neatness and dispatch with which he can do up a misguided critic is shown in the essay entitled Law and Logic. It is a fine specimen of his clearness of thought, his accuracy of statement,

his admirable temper and his literary deftness. Here, as always, he makes the law speak the language of the gentleman.

Another essay which will repay repeated perusal is that on The Teaching of English Law at Universities. It is an unanswerable plea for the highest equipment on the part of the teacher, and the most thorough and painstaking study on the part of the pupil. To this end he insists that "our law schools must be endowed as our colleges are endowed. If they are not, then the managers must needs consult the market, and consider what will pay: *they will bid for numbers of students instead of excellence of work.*"

THE AMERICAN CONSTITUTION. By FREDERICK JESUP STIMSON. New York: Charles Scribner's Sons. 1908. pp. 259.

In this small volume we have Professor Stimson's Lowell Institute Lectures, eight in number, delivered in 1907. In these he discusses "The National Powers," "The Rights of the States," and "The Liberties of the People," giving us a careful study of constitutional principles, forms and tendencies in the United States.

In the first three chapters, the author sets forth the great constitutional rights which characterize Anglo-Saxon liberty, and in chapter four their development is traced through English History. The fundamental rights or principles are: (1) government by law as distinguished from personal rule, (2) one law for all, which means the absence of special administrative law for the protection of officials, so common in Europe, and (3) complete liberty of action, subject to penalty after the act, but free from direction before it.

The third of these is stated thus: "The common law speaks only in damages. It has no notion of ordering a freeman to do something against his will." This leads to a study of the Injunction, which is a development from English Chancery jurisdiction,—but along continental rather than Saxon lines. While beneficent in intention, and often useful, it has been abused in this country until it has become the practice of companies, "instead of suing in damages, or using the local police protection, to get an order from the Federal judge addressed to the whole body of their employees, or even to all the world, ordering such people to do or not to do what they wish or what they complain of."

Comparing the English and American systems with each other, the author finds that the latter has made four important additions to the former. First, the written constitution to limit the powers of government and protect the minority. Second, the separation of powers so that the making and administering of law shall not fall into the same hands. Third, the establishment of two governments over the same individuals but with different jurisdictions. Fourth, the creation of a Court with authority to pronounce on the constitutionality and hence the validity of a law; from which it follows that in our system the last word is with the judiciary rather than with the legislature or the executive. "No other country in the world has this principle," and it "is the envy and the marvel of the rest of the civilized world."

The second half of the book deals with present tendencies in the United States, and it furnishes abundant food for serious thought. The author has made an exhaustive analysis of the constitution, showing the distribution of powers, with an illustrative diagram opposite the title page. He finds that "the constitution is largely composed of negatives." "Contrary to the apparent impression, the things reserved to the people are as many in number and greater in importance than those delegated to the Federal Power," and "every one of the powers so refused to the Federal Government is a power which in the centuries behind us has proved dangerous to the liberties of the English people when enjoyed by the king or a centralized government."

Among the serious tendencies of the present time the following are noted:

First, the tendency to ignore the reserved rights of the people; to invade the field from which the constitution aims to exclude all government activity. Expressions of this tendency the author finds in public utterances of President Roosevelt, and in various governmental acts which indicate impatience of constitutional restraint. "The fundamental error lying in these conceptions of our government is to suppose that all powers exercised in other countries * * * have been necessarily under the constitution reposed in some branch of the Government, State or Federal."

Second, the tendency to unite different functions of government in the same hands. This he finds in various administrative activities where the making of law and the execution of it are in the same hands. "Government by boards, by commissions, rather than by Congress and the other officers provided for that purpose in the constitution, is getting to be a danger that is not only in the Nation but in the States." "Nearly all these Boards are in effect law-makers, judges, and juries in their own affairs; and though there is sometimes in theory an appeal from them to the courts, it is almost impossible for an ordinary man who has a grievance to get beyond the Board or Commission if it decide against him."

Third, the tendency toward centralization by increasing Federal powers at the expense of those of the States. This process is now going on apace, largely along the line of regulation of interstate commerce. By this process the Federal government "will cease to be purely political, but will thrust its hand between every man and his neighbor, between every man and his own property. * * * The States will lose control of most of their business affairs, will lose the power to tax their own enterprises, will see their courts shorn of their jurisdiction. Hardly any business will be so small, so local, as to be left to the State Power to control."

The fourth serious phase of the present trend of affairs is the attitude of the people toward the fore-mentioned tendencies. It is distinctly one of approval. As strongly stated by the author, "The tendency of the time is the blind rush to cure an immediate evil, oblivious of all else, reckless of method or consequences." This is seen on every hand. It is changing the balance of powers so carefully adjusted in the constitution. Worst of all, it is manifested in a growing disregard for the rights of a minority in other than the religious and political fields, where the impulse to "live

and let live" is still strong. In all this, the people are being led by a popular President who is more than willing to lead in the direction in which they wish to be led. Suggestive in this connection is the author's warning note. "The English people in a thousand years' experience have found that their liberties were never so really in danger as when they knew it least, never so nearly lost as under the kings they liked best."

These representations deserve careful consideration. Indeed, the book as a whole is the most instructive study of the present constitutional situation in the United States which has yet appeared.

WILLS AND THE ADMINISTRATION OF THE ESTATES OF DECEASED PERSONS. By WILLIAM PATTERSON BORLAND. Kansas City, Mo.: Vernon Law Book Company. 1907. pp. xvi, 311.

Professor Borland, who is the Dean of the Kansas City School of Law, calls attention in his preface to the fact that this volume "is the revision and publication of a series of lectures * * * which have been delivered yearly for the past twelve years to the senior class" of his school, and states that he has cited "all the decided cases on the law of wills in the states of Kansas and Missouri, as well as the leading cases in other states."

An examination of the Table of Cases shows to what a great extent the author has thus relied on the decisions of the courts of the two states of Missouri and Kansas. The total number of cases cited is 707, distributed as follows: Missouri and Kansas, 669; all other jurisdictions, 38. These 38 cases are distributed thus: U. S. Supreme Court, 13; U. S. Circuit Court of Appeals (a Missouri case), 1; England, 8; New York, 7; Massachusetts, 2; and one each from the states of Arkansas, California, Connecticut, Michigan, New Hampshire, North Carolina and Pennsylvania.

It appears also, that in dealing with the decisions of these other jurisdictions, the author has hardly shown the same thoroughness as in the case of the law of Missouri and Kansas. Thus in citing *Thorn* v. *de Breteuil*, 86 App. Div. (N. Y.) 405, no attention is called to the fact that on appeal to the Court of Appeals (179 N. Y. 64; June, 1904) the judgment below was modified in such a way as to deprive the statement of the opinion below, as cited by the author on p. 196, of any force as an authority on its own account, though the statement itself is in fact correct. This same case is cited again on p. 200 to support the statement that "Lord Thellusson's Act has been adopted in New York," a proposition which the case cited naturally does not justify. What the court says is, that the Thellusson Act "is the basis of our legislation." So the case of *Tilden* v. *Green* (1891), 130 N. Y. 29, is cited to support the proposition that "the English doctrine of *cy pres* does not exist in New York"; but no reference is made to the subsequent New York statutes, L. 1893, ch. 701, as amended, and Real Prop. L. sec. 93.

These points are mentioned, not at all to discredit the accuracy of the author within the particular field of Missouri and Kansas law to which he has avowedly devoted his chief attention, but merely to emphasize the fact that the work is hardly likely to prove of large practical value to the

lawyer or student in other jurisdictions. It does appear, however, that the courts of the two states named have had occasion to pass upon a large number of points in the law of wills, and that the author of this summary of their decisions is thus enabled to present a fairly complete outline of the more important principles in that field.

The book does not purport to contain any extended discussion of legal principles, and in view of the fact that it is addressed to the bench and bar, it is not primarily valuable in imparting to its prospective readers directly anything new in legal lore by way of citation or discussion of authorities. The cases cited in the notes are principally elementary, but of such cases a very good collection is there to be found. However, the book may not be said to be without value legally, because it clarifies the facts and the actual relations to which legal principles can then be intelligently applied.

"Short Sales" of Securities Through a Stockbroker. By Eliot Norton. New York: The John McBride Co. 1907. pp. 71.

Mr. Norton, the author, a member of the New York bar, is a Harvard man, B. A. 1885, A. M. and L. L. B. 1888. He is a son of Charles Eliot Norton, L. L. D., L. H. D., Litt. D. and D. C. L., Professor of the History of Art at Harvard from 1874 to 1898, and since then Professor Emeritus.

The book is very small, containing only forty-nine pages of text and seventeen pages of notes. It does not touch upon the kindred subject of purchases on margin. Its object, as stated in the author's preface, is to make more clear the actual manner in which a "short sale" is conducted, because such sale "is the most complicated of all common commercial transactions." The author attains his object very clearly and concisely. He first describes stock exchange methods in general in a manner showing intimate knowledge. Then he takes up the so-called "sale" at its inception in the customer's order and follows each successive step until he concludes with the right of the various parties concerned to terminate the transaction and the actual manner in which it is closed.

Many elements of the "sale" are generally understood; for example, the right of the customer to have notice before being closed out. The statement of these portions, though necessary to a connected description of the whole venture, is somewhat trite. Such portions, however, are not frequent in comparison with those regarding which general knowledge is somewhat faulty; for example, the method by which the broker obtains for his customer—from another broker, or otherwise—the stock, which must be actually sold in order that the "short sale" be legal. The terms upon which such stock is held is another very hazy phase of the relation which is much clarified.

A Supplement to a Treatise on the System of Evidence in Trials at Common Law. By John Henry Wigmore. Boston: Little, Brown & Company. 1908. pp. xiii, 459.

This Supplement appears as the fifth volume of Professor Wigmore's monumental work on Evidence. Reviews of the separate volumes of the

treatise itself will be found in 5 COLUMBIA LAW REVIEW, 68, 176, 252, 412. The present supplementary volume maintains the high standard of the original work. The new material is arranged under the same section numbers and section headings as appear in the treatise itself. This new material consists chiefly of citations to the late cases (1904-1907) applying the law of Evidence. Some four thousand cases are cited. In accordance with the plan of the original work the statutes also are collected. Few changes in the text have been made. Most conspicuous among such changes are those concerning the new immunity statutes and the decisions interpreting them (p. 26 *et seq.*). The Thaw trial has led to two new sections (§§ 262, 263). That Mr. Wigmore's laborious researches have not dulled his sense of humour is evident in many places. The interesting cross-examination on page ninety is an illustration. The book is just what one would expect it to be, excellent. There have been no striking changes in the subject to record.

A new index to the entire treatise is added. This is more detailed than the index in the fourth volume and will be appreciated by those who have not had time to familiarize themselves with Mr. Wigmore's classification of the subject.

A TRUSTEE'S HANDBOOK. By AUGUSTUS PEABODY LORING. Third Edition. Boston: Little, Brown & Co. 1907. pp. xxxvi, 224.

In his preface to the first edition the author said, "This little book is meant to state, simply and concisely, the rules which govern the management of trust estates, and the relationship existing between the trustee and the beneficiary." This purpose involves the difficulty of brevity and accuracy. The terseness and precision with which the various principles are stated is admirable. That the book is acceptable sufficiently appears from the fact that it has reached a third edition within nine years.

While it was prepared mainly for the guidance of the non-professional trustee, as well as for the professional reader, it can be heartily recommend to the law student who wishes a clue to follow in his first study of the Law of Trusts, or for assistance in review.

There are a considerable number of inaccuracies in the notes, which should not appear in a third edition. Cases that properly might be cited only from the Reporter System in 1898, or 1900, now should have references to the State Reporters. The Note on page VIII should mention Professor Ames' Case Book on Trusts. For while the frequent references to "Ames" in the body of the book are intelligible to most readers, it is scant courtesy thus to dismiss a work to the author of which the writer is so obviously indebted.

REVIEWS TO FOLLOW:

MARKETABLE TITLE TO REAL ESTATE, BEING ALSO A TREATISE ON THE RIGHTS AND REMEDIES OF VENDORS AND PURCHASERS OF DEFECTIVE TITLES (AS BETWEEN THEMSELVES). Second Edition. By CHAPMAN W. MAUPIN. New York: Baker, Voorhis & Co. 1907. pp. lxxvi, 910.

COLUMBIA LAW REVIEW.

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LIABILITY FOR WASTE.

I.

AT COMMON LAW.

If the principle of authority has any place in the law—a proposition open to serious question—it is surely pushing it too far to recognize its binding force in matters of history. The great name of Lord Coke may, indeed, lead us, even while, with the rest of the profession, we wonder,[1] to accept the strange reasoning of *Dumpor's Case*,[2] to follow, however reluctantly, the lead of *Spencer's Case*,[3] to acquiesce in the doctrine, fathered by him, that upon the dissolution of a corporation its lands revert to the donor instead of escheating to the lord of whom it is held,[4] but it cannot require us to accept unquestioningly his statements as to the law of an earlier day. It is in this uncritical spirit that the profession has always accepted Coke's description of the law of waste before the enactment of the Statute of Marlbridge.[5] It is true that some of his statements have received a broader interpretation than they will bear. The celebrated passage in the Commentary upon Littleton,[6] in which he declares that the writ of waste did not lie against the lessee for life or years before the Statute of Gloucester,[7] commonly interpreted as an assertion that the common law afforded no protection against waste by tenants for life or years, is merely a statement of the indisputable fact that the writ of waste, which was framed on the statute and, as he says, was created by it, did not lie before the statute. So where, in his commentary on the Statute of Marlbridge,[8] he says that "against lessees for life or

[1] *Per* Mansfield, C. J., in *Doe* v. *Bliss* (1813) 4 Taunt. 735.

[2] (1603) 4 Co. 119, *b*. [3] (1583) 5 Co. 16, *a*.

[4] Co. Litt. 13, *b*; Gray, Perpetuities, §§ 44-51; 2 Harv. L. R. 163, 164.

[5] (1267) 52 Hen. III, c. 23, § 2. [6] Co. Lit. 54, b.

[7] (1276) 6 Edw. I, c. 5. [8] 2 Inst. 145.

years there lay no prohibition of waste at the common law," he is obviously speaking only of that extraordinary process of the early law whereby the courts of common law by writ of prohibition anticipated the remedy by injunction with which the court of chancery was later to make us familiar. Again, in *Bowles's Case*,[9] Coke, then chief justice, reiterates the statement that "a prohibition of waste lay against tenant in dower and by the curtesy at the common law and not against the lessees till the said Statute of Marl.," and makes it clear that he is referring to the remedy and not to the legal quality of the act by quoting from Bracton a well-known passage[10] defining the rights of the conventional tenant for life, and adding, "which proves directly that it was a wrong in the lessee for life to do waste or destruction at the common law."

Thus far our authority has said nothing to indicate that the lessor was wholly without remedy at common law for waste committed by an ordinary tenant for life or years, while his comment on Bracton would seem to intimate that some remedy did exist in such cases. The common law armory has other weapons of offense and defense than writs of prohibition and waste. But it soon appears that Coke uses the phrase "it was a wrong," in the quoted passage, in the sense of Bracton's expression, *"fecit transgressionem,"* not as furnishing grounds for an affirmative remedy against the wrongdoer, but as a basis for denying him a remedy against the injured lessor. Thus it may be conceded that a lessee for life could not, even at common law, make himself the owner of timber trees cut down by him without authority of his lessor[11] or that a lessee who has been evicted for abusing the freehold should not have an assize to reinstate him in the seisin,[12] without assuming as a necessary or even probable consequence that the lessor might have stayed the waste by writ or that the law supplied him with the means of recovering the place wasted and damages for the waste committed. It is a truism that every legal wrong has a legal remedy—else it were no wrong—but it by no means follows that the remedy provided by the law is proportioned to the wrong done. Elsewhere, however, our author becomes more explicit. In his exposition of the Statute of Marlbridge, previously referred to, he supplements his statement that prohibition of waste did not lie against lessees for life or years at the common law by the addi-

[9] (1615) 11 Co. 79, 82. [10] Bk. IV. f. 217. [11] *Bowles's Case, supra.*
[12] Bracton, *ubi supra.*

tion,[13] "because they come in by the act of the lessor, and he might have provided upon the making of the lease against waste to be done, and he that might and would not provide for himself, the common law would not provide for: otherwise it is of estates created by law," etc.; and in his commentary on the Statute of Gloucester he says,[14] "At the common law waste was punishable in three persons, viz.: tenant in dower, tenant by the curtesie and the guardian, but not against tenant for life or tenant for yeares, and the reason of the diversity was," etc.—giving the same reason as in the preceding passage. We may conclude, therefore, with some degree of confidence that Lord Coke really entertained the opinion, which has been attributed to him and reiterated with scarcely a dissenting voice[15] by numberless writers since his time,[16] that prior to the Statutes of Marlbridge and Gloucester the common law afforded no affirmative remedy for waste, either by prohibition, forfeiture of estate or action for damages, against a lessee for life or years.[17]

It requires a greater measure of confidence to declare that Coke was wrong in his opinion, but the evidence to that effect, though slight in quantity, is conclusive.

Bracton's authority, cited by Reeves,[18] is, indeed, not conclusive, though his reference to a waste so small in amount (*ita modicum*) that an inquest ought not to be held about it,[19] indicates the existence of a process involving an inquiry into the alleged waste, and, perhaps, an assessment of damages against a life tenant. But that the commission of acts of waste by the ordinary tenant for life was a wrong, and that it put him in a measure outside the law's protection so far as his freehold was concerned, Bracton makes clear. In such case the chief lord, or, it would seem, "any one who has an interest in the matter, as a relative or a friend," may disseise the injurious tenant and hold the land until he has made full satisfaction for the waste committed and given security not to make further waste.[20] But the cases to which Bracton had access,

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[13] 2 Inst. 145. [14] 2 Inst. 299.

[15] 2 Reeves' Hist. Eng. Law, 73; 2 Poll. & Mait., Hist. Eng. Law, 9.

[16] Fitz. Nat. Brev. 55; Doct. & Stud. II. c. 2; 2 Bl. Com. 282; Bewes, Waste, 1. 2.

[17] See also *Countess of Shrewsbury's Case* (1600) 5 Co. 13.

[18] 1 Hist. Eng. Law, 386. [19] Bract. f. 316, b.

[20] Bract. f. 169, 217; Britt. 113, b. This seems to have been an early and, later, a frequent mode of redress. See *Laceby* v. *Malet* (1203) 2 Sel. Civ. Pleas 144: a case of waste by a guardian.

and which have now through the labors of Professor Vinogradoff and Professor Maitland been made accessible to us also, demonstrate that the inference suggested by his remark about an inquest, quoted above, is equally conclusive. While most of the cases of waste which have come down to us from the first half of the 13th century have to do with the wrongdoing of tenants in dower, and, somewhat less frequently, of tenants in chivalry, there is nothing to indicate that the same remedies employed against these tenants were not equally available against ordinary tenants for life. Though the terms in which the "conventional" tenants of that day were described, *"qui habet ad terminum," "qui tenet ad firmam,"*[21] were equally applicable to tenants for life and for years, it may perhaps be assumed that the "termor," as tenant for years came to be called, had not yet reached the dignity and importance of being subjected to writs of prohibition and the like. Though his possession had come to be protected in the king's court against wrongful eviction by his lessor, his ordinary rights and obligations were probably still defined and enforced in the manorial courts. But for the life-tenant, whether legal or conventional, there was one law of waste, one forum, one and the same process.

This may seem too confident a statement when the meagre evidence is spread before the reader. But it will be borne in mind that the judicial records of the period under examination are still for the most part buried in inedited and unpublished manuscript rolls; that the collection of cases given to the world a few years ago under the description of "Bracton's Note Book," which is our principal source of information, is a fragmentary selection of decisions of two judges only—Pateshull and Raleigh—and covers a period of less than a quarter of a century (1217-1240); that the cases include the entire field of the common law of the 13th century, of which the law of waste constitutes but a very small part. We shall not, therefore, draw any unfavorable conclusions as to the state of the law of the subject if we find but few cases dealing with it. A single ray of light out of the darkness will illumine it.

The Note Book contains twenty-five cases dealing with waste, five of which concern ordinary tenants for life. The first of these is the case of Matilda de Gatesdena,[22] who was attached at the suit of Ranulf de Gatesdena for committing waste in lands which she held only as tenant for life (*quas non habet nisi ad vitam suam*

[21] Bract. N. B. 607, 691, 1304. [22] Bract. N. B. 443, 540.

tantum), in violation of a fine made between them before the justices, etc. An inquest was directed which found waste to a small amount, whereupon the said Matilda was adjudged to be in mercy and to pay the amount of the waste to the said Ranulf and to give pledges that she would commit no more waste.

The next case is that of Peter Pejure,[23] cited by Bracton,[24] who held the lands *"ad terminum"* and who was attached to answer Nicholas Creusquer for waste, and because the waste was of so small value (*de tam parva re*) the case was dismissed, but a prohibition issued forbidding Peter to commit any further waste.

The third case is that of Thomas de Haya,[25] attached at the suit of John de Bello Campo for waste done in lands which the said Thomas held *ad firmam* of the said John; but the case abated, owing to the fact that defendant, by claiming the fee, raised a question of title, which could not be tried in an action of waste.

The case of Robert de Hastings,[26] attached for waste at the suit of Thomas, son of Godfrey, does not disclose the nature of the tenancy, but it can have been neither dower nor wardship, and was probably not curtesy. The waste being traversed, an inquest was ordered.

Our last case is that of Robert de Corneville,[27] summoned before the justices of the King's Bench to answer the complaint of Richard of Elmham for waste committed by him *contra consuetudinem Angliæ* in lands which the said Robert held of the said Richard for life (*ad terminum vitæ*). Both parties having put themselves upon the country, an inquest was ordered.

Here then we have the whole range of cases in which the action of waste was available—*contra finem, contra conventionem, contra consuetudinem Angliæ*—and all the usual remedies and process: writ of attachment, inquest, judgment for the amount of the waste, pledges by the tenant and prohibition. There seems little ground, therefore, for the conclusion of the learned authors of the History of English Law that "it seems probable that in the past a tenant for life has been free to use and abuse the tenement as pleased him best," or for the suggestion that "The alleged wrong is not that of committing waste, but that of committing waste after receipt of a royal prohibition."[28]

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[23] N. B. 607. [24] Bract. f. 316, b. [25] N. B. 691.

[26] N. B. 718. [27] N. B. 1304, 1371; s. c. Fitz. *Wast.* 140.

[28] 2 *Poll. & Mait.*, 9. The references (Bract. f. 315; Bract. N. B. 574) are to cases of waste by dowress.

It is a curious fact that the only tenant whose rights in the land in the matter of waste are left indeterminate by the authorities is he who holds by the law of England. It is true that Lord Coke in his Commentary on Littleton,[29] as well as in his notes on the Statute of Gloucester,[30] includes the tenant by the curtesy among those liable for waste at common law, by reason of the fact that, like tenant in dower and guardian, he comes to his estate by operation of law; but in the notes on the Statutes of Marlbridge he omits him from this category,[31] a fact which has led some later writers to doubt whether the liability of tenant by the curtesy was recognized by the earlier law. In corroboration of this doubt we may note that Bracton, though treating fully of tenancy by the curtesy, does not mention the tenant's liability for waste,[32] and that among the cases abstracted in the Note Book, there is not a single one in which he figures. It is significant, too, that in the famous compilation of Norman law, the *Très Ancien Coutumier de Normandie,* made at the beginning of the thirteenth century and representing a legal system almost identical with that described by Bracton a half century later, the liability of dowress[33] and guardian in chivalry[34] for waste committed by them is plainly declared, but there is no reference to a similar liability on the part of tenant by the curtesy. It would, of course, be easy to overestimate the importance of these omissions. At the best, they furnish only negative evidence, and, in case of the *Coutumier,* it may be remarked that a legal treatise which does not deem the tenant by the curtesy of sufficient importance to treat of him could not be expected to discuss his liability for waste.

On the other hand, may it not be that, in grouping tenant by the curtesy with tenant in dower and guardian, and inferring his liability for waste from the resemblance of his estate to theirs, we are belittling his importance in the feudal law of property? We do, indeed, speak of him as a tenant for life, but it must be remembered that his tenancy by the curtesy is the projection of a real seisin in fee, and that the operation of the law in his case is not, as in the case of dower and wardship, to confer upon him an estate

[29] Co. Lit. 53, a. [30] 2 Inst. 299.

[31] 2 Inst. 145. And see Fitz. Nat. Brev. 55, c.

[32] Except in one place (f. 169) where he denies him the right to an assize of *novel disseisin,* if excluded by the lord for waste. See *supra.*

[33] Cap. LXXIX, *De Dotibus,* § 9.

[34] Cap. XI, *De Custodia Orphani,* § 2.

for life, but to cut down his fee to a life estate. During coverture, while jointly seised with his wife of an estate of inheritance, there was nothing to prevent him from using the lands as he saw fit, and there is no *a priori* reason for believing that, upon the death of his wife, he would be subjected to any greater restraint in its use than was imposed upon him before that event. His position in this respect is not unlike that of tenant in special tail, whose fee has, by force of circumstances, become in point of duration no more than a life estate, but remains unaltered in quality. Words are forces in law, and the effect of describing the estate of tenant by the curtesy as a life estate will ultimately be to subject it to the ordinary incidents of the life estate; and it is, therefore, not improbable that tenant by the curtesy came in the course of the common law to be impeachable of waste. But if this result was in fact reached, it was not because his estate was like those of guardian and tenant in dower, nor yet, as Coke asserts, because it came to him by operation of law, but because he had come to be regarded as a tenant for life, and tenants for life were subject to the penalties of waste.

If the conclusions indicated in this study of the feudal law of waste are correct, the time is ripe for legislation. There is, indeed, no lack of power in the king's court, and this power is exercised through a varied and elastic procedure, but waste is rampant and the penalties of the law are too mild to check it. Moreover, it is a period of industrial and social transformation, with whose changes the courts cannot keep pace. There has already been legislation to regulate the relations to their lords of a new class of land-holders, to be known as "termors," who occupy the land, not as freeholders but for a definite term, and there will shortly be more legislation to protect them against the aggressions of strangers. These termors are apparently a robust class of persons, insistent on their rights and usually free men, if not freeholders—men neither too squeamish nor too timid to waste the lands committed to them, and, moreover, protected by the new legislation from interference by the lord with their wrongful acts.

If there is no law of waste for these men, such law must be made without delay. It is not important, at least it is not possible, to determine whether Thomas de Haya, who held certain lands of John de Bello Campo *ad firmam,* and who was convicted of waste in the 16th year of Henry III[35], was or was not a termor.

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[35] Bract. N. B. 691; *supra*, p. 429.

Tenants for life might also hold *ad firmam.* There is no other evidence that tenants for years were held liable for waste, and it was not to be expected that they should be. The courts move slowly in the process of adjusting the old rules to new conditions and in 1267, when the Council stepped into the breach, the writ *quare ejicit infra terminem* was only thirty years old, and the position of the termor had scarcely become recognized as being in the nature of a tenancy at all. Between it and the freehold there was a deep gulf fixed, and it required something more than judicial insight to see that what was law for the one was law for the other.

It is in this condition of affairs that we find the key to the provision regarding waste in the Statute of Marlbridge. Its language, in Coke's translation, will bear repeating, viz.: *Also fermors during their terms shall not make waste, sale nor exile of house, woods and men, nor of anything belonging to the tenements that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing, if they do and thereof be convict, they shall yield full damage and shall be punished by amerciament grievously.*[36]

Who are the fermors (*firmarii*) at whose wrongdoing the statute is aimed? Coke says,[37] "all such as hold by lease for life or lives, or for years, by deed or without deed," and he quotes, as applicable to the word *firmarii*, Bracton's observation on *terminus*, that it is to be liberally construed (*large se habet*) so as to include a term for life as well as a term of years (f. 318). But while Bracton is clearly right in his interpretation of the word *term*, Coke appears to be wrong in placing a similar construction on *fermor*. Bracton himself uses the term *firmarius* only of one who holds a tenement for a term of years, and, in a well known passage in his chapter on the writ, *quare ejicit* (f. 220, b), he compares the position of the *firmarius* with that of the freehold tenant in such a way as to make them mutually exclusive.[38] It is true that the term *firma*, variously translated "ferm" and "farm," whether employed as a noun or a verb, is used for tenancy for life as well

[36] Stat. Marl. 52 Hen. III. c. xxiv. *Item firmarii tempore firmarum suarum vastum, venditionem vel exilium non facient de domibus, boscis vel hominibus, nec de aliquibus ad tenementa quæ ad firmam habent spectantibus*, etc.

[37] 2 Inst. (Stat. Marl.) 145, (1).

[38] *Non magis poterit aliquis firmarium ejicere de firma sua quam tenentem aliquem de libero tenemento suo.* Bract. f. 220, b. See also, *ibid.* f. 318.

as for years; but not so the word *firmarius.* In brief, tenant for life as well as tenant for years may hold lands to farm, but only the tenant for years is a farmer. This interpretation of the term employed in the statute is confirmed by the Register in a passage which may be adopted as a final construction of the provision in question.[39] The effect of the statute was not to limit or define the action of waste, nor to render its penalties more definite and certain, nor to provide any new procedure for its repression or punishment, nor yet to extend it to any class of life tenants not previously subject to it, but only to bring the fermor, the new tenant for years, within its operation. This was enough for it to attempt, and this it achieved.

That the penalties of waste were not affected by the Statute is apparent when its language[40] is compared with the terms in which the prohibition of waste is couched in the rules and decisions of the feudal law. Thus in the *Summa de Legibus Normanniæ* it is provided that the lord committing waste in his ward's land shall be grievously amerced (to use Coke's translation once more) and make full restitution,[41] and in the Note Book the judgment, when given, usually declares the injurious tenant to be in *misericordia.*[42] There is no doubt that he, who, through disobedience of the royal prohibition, has come into the king's mercy, might and often was compelled to redeem himself by a grievous amercement, but in practice the forfeiture for waste seems generally to have been limited to the amount of the damage caused. At the best, it was indefinite and uncertain. The anonymous author of *The Mirrour of Justices,* who found the legal world of his time so sadly out of joint, condemns the statute for its mildness; "for waste," he says, "is a personal trespass and requires a personal punishment and not a simple amercement."[43]

It was to remedy this defect of the common law that the Statute of Gloucester, Cap. V, was enacted.[44] This it did, first, by

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[39] *Et sciendum quod per statutum de Marlbridge, cap. 22, data fuit quædam prohibitio vasti versus tenetem ad terminem annorum.* Regist. Brev. 72.

[40] "*Quod si fecerint * * * dampna plena restituant et per misericordiam graviter puniantur.*" Stat. Marl. cap. xxiv.

[41] "*Graviter debet emendare et plene restituere.*" *Coutumiers de Normandie,* vol. II, cap. xxxi. *De Custodia,* 16.

[42] Bract. N. B. 56, 540. The judgment does not generally appear.

[43] *Mirrour,* c. v, § 3: Of the Statutes of Marlbridge.

[44] (1278) 6 Edw. I.

providing a new process, the writ of waste, and, second, by affixing to the offense a severe and definite penalty, viz.: forfeiture of the place wasted, and thrice the amount of the damage committed. The statute enumerates the various classes of tenants who were thenceforth to be subject to the new action and its penalties, "him that holdeth by law of England or otherwise for term of life or for term of years, or a woman in dower." It does not, therefore, enlarge the number of persons subject to impeachment of waste, unless, indeed, as Coke himself suggests,[45] tenant by the curtesy may now for the first time have come under restrictions in this respect.

It is not too much to say that the institution of the new process was an event of the first importance in the history of the law of waste. Its directness and simplicity, perhaps also its inflexible and drastic character made it a favorite remedy and tended in course of time to give definiteness and stability to the relation of landlord and tenant. It must have done much to promote the letting and improvement of lands. It is true that it substituted a rigid, inelastic procedure for the flexible process of the common law, but this was not an unmixed evil. There is a stage in legal development when definiteness and certainty, even in matters of procedure, are the first requisites of law, and that stage had now been reached in the common law system. The crystallization of the procedure in waste was only an example of what was happening in every other department of law. It is doubtless true, as Coke says,[46] that the writ of prohibition was still available to the lord against a wasting tenant, but it is probably also true that it was seldom resorted to and soon fell into desuetude. It was to be many years before this excellent remedy,[47] in another court and under another name, was to be employed to restrain the commission of acts of waste, but the new action instituted by writ framed on the Statute, providing amply for compensation and by its terrors exercising a wholesome restraint upon the tenant, held undisputed sway for four hundred years, and was not completely superseded until another century had been added to its span of existence. It is a commonplace that legal institutions are among the most persistent of human creations, and forms of procedure have often displayed an astonishing vitality in our own as well as in other legal systems.

[45] 2 Inst. 301, pl. 3. [46] 2 Inst. 299.

[47] See Lord Coke's praise of it: 2 Inst. *loc. cit.*

but the "perdurableness" of the action of waste is notable even among legal institutions. Such a process, with its stern and inflexible penalties and with such a history, can hardly fail profoundly to modify a body of law which had been developed under a milder régime.

To examine in detail the influence of the Statute of Gloucester on the law of waste would be to write a treatise on that branch of the law. Within the limits of an article such as this only one aspect of its operation can be considered—its effect on the doctrine of permissive waste.

We have Coke's authority for the statement, fully borne out by the cases, that "neither this act nor the statute of Marlbridge doth create new kind of wastes, but do give new remedies for old wastes: and what is waste and what not, must be determined by the common law."[48] The authorities prove abundantly that at the common law tenant was liable for permissive as well as for voluntary waste. Most of the cases, it is true, are concerned with acts of destruction, such as the cutting and sale of trees, the pulling down or removal of houses, and the like, by the tenant, but there are interesting and significant instances of the other sort. Thus in the case of *Walter de la Sauceye* vs. *John de Cestria*,[49] the waste was twofold, cutting and carrying off timber and permitting buildings to fall down (*et permittit decidere domos*) which should have been kept up (*sustentari*). In another case, Royesia de la Dene,[50] a guardian in chivalry, was required to restore a kitchen which was burned in her time, two farm buildings (*veteres grangias*) which had collapsed for want of repair (*pro defectu sustentationis*) and to repair all other buildings on the premises, and was prohibited from causing any further waste. In the case of *John Sanford* vs. *Cecilia Sanford*,[51] a dowress was held to answer for having permitted a fish-pond and mill to go dry (*molendinum omnino dessicatum est et fractum et vivarium similiter*). From the language of the writ it is apparent that the defendant was charged with no act of destruction, but only with failure to repair, and from her plea that the want of water was due to the drought of summer, it

[48] 2 Inst. 300, 301. A good instance is furnished by an anonymous case, (1309) 3 Edw. I, pl. 49, holding that tenant in dower can be made to answer for exile of folk, although there is no mention of exile in the Statute of Gloucester, c. 5.

[49] Bract. N. B. 739. [50] *Ibid.* 1165: s. c. Fitz. *Wast.* 139.

[51] Bract. N. B. 1617.

is plain that her obligation to repair was fully recognized. It is noteworthy that this early jurisdiction *in personam,* which we to-day call equitable, then exercised by the king's court, not only took on the form of a mandatory injunction, as in the case of Royesia de la Dene, above referred to, but was apparently employed in the Sanford case to restrain permissive waste,[52] a jurisdiction which our courts of equity have refused to assume.

It is not necessary to multiply instances of the recognition of permissive waste at the common law. The fact that cases of such waste were frequent in the early history of the new procedure,[53] and were dealt with as a matter of course, indicates that it was no new thing, and on this point Coke's authority is unimpeachable. What is to be noticed is the fact that in the early law, whether before or after the statute, no distinction is made between the decay and deterioration of the premises from the silent effects of time, the neglect which permits the sea to rush in and engulf a marsh or meadow, and the harm suffered through the wilful or negligent acts of wrongdoing of a stranger. All are equally imputed to the tenant, and, under the common description of permissive waste, are equally obnoxious to the statute as to the custom of the realm on which the earlier writs were founded.[54]

In fact, the tenant, as to the lands entrusted to him, has, like the common-carrier and the inn-keeper with respect to the goods entrusted to them, become a virtual insurer, save against the act of God and the public enemy. It is true that the nature of this liability is not always recognized and that the tenant's default is sometimes stated in terms of negligence; as *per* Willughby, C. J., in an anonymous case reported in Fitzherbert,[55] where the burning of a kitchen by a stranger during the tenant's absence was adjudged waste "for want of a good watch," and in the puzzling case in 21

[52] The point is not clear; the prohibition may have been intended only for acts of voluntary waste, which were also found by the inquest.

[53] A few cases arising under the statute may be given: Y. B. (Rolls Ser.) 18 Edw. III, 40 (leaving a house uncovered); Y. B. (Rolls Ser.) 17 & 18 Edw. III, 339 (permitting a sea-wall to fall out of repair); Y. B. 11 Hen. VI, 1 (failure to protect a wood against cattle); Y. B. 10 Hen. VII, 5 (leaving a mud-bank unprotected); Owen, 43 (neglect to clean ditch); Moore, pl. 173, 187, 200 (failure to repair river-bank and sea-walls); Cro. Car. 381, pl. 9 (permitting walls to decay for want of plastering); Fitz. Nat. Brev. 60, g (waste done by a stranger); Y. B. 11 Hen. VI, 1 (waste by a stranger).

[54] The usual form of the writ is *vastum fecit contra consuetudinem regni.*

[55] (1345) Fitz. Abr. *Wast.* pl. 30.

Edw. I,[56] in which the sheriff was directed to inquire whether an accidental fire was due to the default of the tenant or not. But the default of the tenant in these cases is obviously not his failure to reach the ordinary standard of diligence, but rather his neglect of those precautions which avail to avert all casualties save those due to the elements and to war. The fact that no case is to be found in which due care was pleaded by tenant accused of permissive waste, coupled with his unquestioned liability for the consequences of non-repair of palings, houses and river-banks, seems conclusive on this point. In short, the custom of the realm not only required of him that he "should do no waste himself," but also "that he should suffer none to be done."[57]

The foregoing recital brings the history of waste down almost to the time when a new remedy, based on milder principles, will supersede the writ instituted by the Statute of Gloucester as completely as that had superseded the process of the earlier law. But as yet there is no amelioration of the lot of the tenant, whether the waste imputed to him be voluntary or permissive, whether due to his default or to the wrongful act of another. The definition of waste remains unchanged. The custom of the realm still governs. Lord Coke's words are still true, that "what is waste and what not, must be determined by the common law."

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[56] Y. B. (Rolls Ser.) 21 & 22 Edw. I, 29.

[57] Doct. & Stud. II, c. iv.

PROGRESS IN LAND TITLE TRANSFERS; THE NEW REGISTRATION LAW OF NEW YORK.

Interests in real property would be worthless, but for the security of their titles. Advance in their values depends largely also on the facility and cheapness with which the titles can be assured and handled. As personal property has grown and multiplied in importance through the centuries, and especially within the last three hundred years, realty interests, although advancing steadily, have failed to show a corresponding increase. Among the chief causes of this difference have been the difficulties with which transfers and other dealings with realty have been beset. Therefore, it may be of some interest and advantage to outline here the history of the manipulation of titles to real property, especially in common law jurisdictions; to point out some of the most important advantages and disadvantages of the systems that have been employed; and to endeavor to explain why a method of official and ultimate *registration of title* is the most scientific and advantageous system yet devised. To these three general departments of the subject will be added a brief argument in favor of the method of registering titles that has recently been provided for by Chapter 444, of the Laws of 1908, of the State of New York.

Dealings with real property titles may be said, in a general way, to have been evolved along three different lines or methods. The *first* of these is conveyancing without any public registration; the *second* is by the registration of the instruments or documents of title; the *third* is by the official registration of *titles,* as distinguished from the record of the instruments by which they are authenticated. The growth and scope of each of these is to be separately discussed.

I. Conveyancing without Public Registration.

The most natural primitive method of transferring land from one person to another is by the handing over of some symbol of its ownership, either on the land itself or "within the view." Such a ceremony, performed in the presence of reliable witnesses—the neighboring owners—laid the cornerstone of conveyancing. Livery

of seisin is not an artificial invention, but a normal, almost necessary outcome of the primary search for security of title. The Roman Code said to the Common Law, in its framing, *"Traditionibus et usucapionibus dominia rerum, non nudis pactis, transferuntur."*[1] In the remotest age in which history reveals any Teutonic law, a transfer of rights necessarily involved a transfer of things; and a conveyance without the equivalent of livery of seisin was practically impossible, if not then inconceivable.[2] The "earth and stone," the "clap and happer," the "net and coble," the emblematic symbols of the field, or mill, or fishery, were still delivered with due solemnity in Scotland when they figured forth a custom of the long-forgotten past.[3]

When, under Roman influences, one of the ordinary symbols of ownership of English land becomes a writing, it is just as natural as it is to demand a symbol at all that owner after owner shall preserve the parchment evidences, and that intending purchasers shall examine them in their original form, for the purpose of discovering an unbroken "chain of title" to the land. Thus the "strong box" of the English landed proprietor, containing his original documents of title available for proof in litigation or primary evidence in transfer or encumbrance, becomes one of his household treasures, probably even before the Norman Conqueror had crossed the sea with his feudal train. In later centuries, when the use of the taper and wax to prepare and affix a common-law seal enforces the consumption of time enough for deliberation before the deed is delivered, the package of documents in the strong box or safe assumes the form of the somewhat primitive title-receptacle that has been retained in most parts of England down to the present day.

Attempts to advance beyond this archaic method of conveyancing resulted in the statute of enrollment of deeds of bargain and sale in the year 1535;[4] and in the making of Yorkshire a recording county, in 1704;[5] and in doing the same for the great county of Middlesex, in 1708.[6] The English Land Commissioners of 1830, after very thorough investigation, recommended a general registry system for England, similar to those then employed on the continent of Europe, and in Scotland, Ireland and the United States. The

[1] Cod. II., 3, 20; Bract. f. 38 b, 41; 2 Poll. & Mait. Hist. Eng. L. (2nd ed.), p. 89.

[2] 2 Poll. & Mait. Hist. Eng. L. (2nd ed.), p. 89.

[3] 4 Kent's Comm., p. *459.

[4] 27 Hen. VIII, c. 16. [5] 2 & 3 Anne, c. 4. [6] 7 Anne, c. 20.

bill, presented to the House of Commons for the purpose of carrying out this recommendation, was rejected; and nothing more of importance was done for the improvement of conveyancing in England until 1854. The work of a new Royal Commission, appointed in that year, produced several successive bills in Parliament for the registration of *titles* throughout the realm; and the result was the passing of a statute for that purpose in 1862. This statute, known as Lord Westbury's Act, has received a number of amendments and modifications; and, though a system generally optional, has nevertheless resulted in a method of compulsory registration of title in the City of London, as hereinafter explained. It is employed but little, if any, in other parts of the country. Thus, England as a realm, while struggling upward through legislation toward an ideal system of manipulating titles, and bringing its metropolis within the benefits of that system, is still, in the main, following the primitive light of unregistered conveyancing. And it (with Wales) is probably the only country that still retains that system.

II. Registration of Instruments or Documents of Title.

On the continent of Europe, history reveals the unfolding of two distinct systems of registration. One of these, which may be designated the second method of manipulating titles, and which consists of the recording of instruments or documents of title, is now employed in most of the Romance countries, and there finds its central representative in the law of France.[7] It is likewise essentially the system that exists in this country. But the chief peculiarity of that phase of it which is used in France and the countries that follow its system, is that there a sale of real property is complete (between the parties at least) from the time when the contract is entered into; and the contract or any *inter vivos* act of conveyance or mortgage (but not all transfers) may be recorded.[8]

"The provisions of the" (French) "law run as follows: Any *inter vivos* deeds by which real property changes hands are subject to registration. Such deeds may be contracts, or acts of recognition of adverse rights, or determinations at law. . . . As long as such deeds are not registered, the rights they confer cannot be opposed to any third person who has acquired registered rights on the same land."[9]

[7]Morris on Land Registration, p. 102 *et seq.*

[8]French Civil Code, Art. 1583; French law of March 23, 1855.

[9]Dumas, Registering Title to Land, p. 73; French Civil Code, Arts. 1583, 2134, 2146-2154.

The prevalent American method of recording all instruments of conveyance, mortgages and other liens, in such manner as to make them constructive notice to subsequent purchasers and encumbrances of the property, and to give priority of right to priority of record in favor of him who has taken title without notice of outstanding claims, may be said to have begun in Anglo-Saxon law with the statute of enrollment of deeds of bargain and sale, in 1535. Conveyances and mortgages were required to be recorded, for like purposes and results, in Virginia from the earliest period of its history. In the Plymouth Colony, substantially the same system began in 1636; in Connecticut in 1639; in New Jersey in 1676, and in North Carolina in 1715.[10] In New York, the Dutch laws required certain instruments to be recorded in the public offices. After 1664, the Duke's laws enforced the same requirement, and as early as 1684, this was extended by a law which was enacted, as it declared, "to prevent decept and forgerye."[11] Practically all laws as to record in New York, however, were of local operation (for one or more counties) before the time of the revised statutes, January 1, 1830; but, in so far as they operated, they gave constructive notice and priority,[12] as above stated. The case of *Le Neve* v. *Le Neve*[13] was decided by Lord Hardwicke in 1748; and it contains, both for the recording districts of England and for those of America, the fullest illustration and the most decisive utterance of the rule that notice of an outstanding right or interest binds him who takes a deed or instrument of encumbrance, though he has it first recorded. That rule is there said to have had its foundation in the statute of enrollment of deeds of bargain and sale. Therefore, long before the Revolution, it was fixed as a distinctive feature of our law of records and had its controlling influence in moulding that law into its present form.[14]

The unfolding of feudalism in England, and its stringent rule there for upward of six centuries, interfered with material advance from the earliest system of preserving and examining the original instruments of title in the passing or encumbering of real property.

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[10] 1 Baylies's Historical Memoire, 239.

[11] New York Cent. & H. R. R. Co. *v.* Brockway (1899) 158 N. Y. 470, 474.

[12] Laws & Ordinances of New Netherlands, 114, 159; 4 Kent's Comm. p. *456.

[13] (1748) 3 Atk. 646.

[14] Jackson *v.* Burgott (1813) 10 Johns. 457, 461; Dunham *v.* Dey (1818) 15 Johns. 555, 569; Jackson *v.* Chamberlain (1832) 8 Wend. 620, 625; Lamont *v.* Cheshire (1875) 65 N. Y. 30, 40.

Especially did this result follow from the manor system and the law of primogeniture, which kept large tracts of land in the hands of single individuals. An estimate in the British Domesday-book of 1871 showed that, at that time, there were not more than 200,000 landed proprietors in England. These few owners, among whom transfers are comparatively rare, may get along very well with an archaic system which would be wholly insufficient to cope with the multitudinous dealings in real property in the United States. The differences between the two countries, in this respect, were almost as important at the end of the eighteenth century as they are at the beginning of the twentieth. And it was naural that the American landowners of the former period, when they turned from political oppression to the enjoyment of free institutions, should make the holding of their lands allodial, and their availability as assets and security as free and untrameled as in the light of those times it was possible to make them. In doing this, they logically adopted or continued the best system then known to Anglo-Saxon law, the second method of dealing with titles—by record of the instruments of title, as distinguished from the registration of the titles themselves.

Of course, this second method of manipulating titles is useful and convenient in itself, and especially so in comparison with the primitive method of retaining and examining the original documents. It conduces to ease of transfer, and enables a title to be examined with comparative facility and quickness. But such a system grows, and must grow, more and more burdensome as it becomes older. The dangers arising from unrecorded liens, such, for example, as those for decedents' debts, the generality of judgment liens, the difficulties caused by unknown dower rights and the constantly recurring defects in service by publication in law suits affecting titles are a few of the deficiencies which stand forth clear and distinct in this method of dealing with real property interests. Most prominent, however, and absolutely fundamental as objections to such a system, are the expense and time required for re-examination of titles whenever they are passed or encumbered. These patent defects and inconveniences have called, again and again, for investigation and attempts at relief. Practical men have refused, and will always refuse, to believe that a title hundreds of years old must continue to be examined, either from its beginning or from an indefinite time in the past, over and over again, whenever it is transferred or encumbered. If a system that avoids re-examination

of titles can work well in a new country, as is proved to have been the case in Australasia, and if such a system can be successfully inaugurated and operated in countries far older than our own, as has been done in Germany, Austro-Hungary and some of the Cantons of Switzerland, it must be assumed that some similar improvement will ultimately be employed in dealing with all titles to real property in America.

Most prominent, perhaps, among the attempts to improve the prevalent system in this country, without superseding it, is the block index scheme, adopted for New York City in 1887,[15] and applied so successfully there since that time. The area of search is thus greatly reduced, and the resulting labor curtailed. But the vital defect in the system—the necessity for repeated and increasingly expensive searches which must go on forever whenever a title is dealt with—is left untouched by this fully recognized improvement.

A few years before the adoption of the block index system of dealing with titles in the large cities of New York, came the innovation of the Title Guarantee Companies, now such important factors in this department of industry. These companies have deservedly been very successful as corporate enterprises; and they have undoubtedly been of much benefit to real property interests. They have established and used logical and valuable locality indexes, which minimize the danger of error in making searches under the present system. They have made examinations of title quicker and cheaper by their system of reissues, so-called, whereby a title once guaranteed may be thereafter reinsured at reduced cost. They have thus avoided some of the difficulties of re-examinations. But, like the block index system, the Title Companies as now operating leave untouched the vital defect in the mere registration of documents or instruments of title—they leave it necessary to do over and over again the work of examining a title when it is transferred or encumbered. The search of real property interests for improvement will continue until this difficulty, with its resulting expense and delays, is finally overcome.

III. Registration of Title as Distinguished from Record of Instruments.

The conception of a title authenticated once for all, and so dealt with that it must continue valid and practically unassailable,

[15] N. Y., Laws 1887, c. 718.

began to take shape in the Teutonic mind probably as early as the twelfth century. Records of such proceedings, complete and effectual, are found in Vienna dating back to 1369; and they began at various periods between that date and the year 1800 in the towns and cities of Germany and Austro-Hungary.[16] The Civil Code of Germany made title registration compulsory throughout that entire Empire in 1900. In Germany, Austro-Hungary and some of the Cantons of Switzerland, initial registration is now brought about by a judicial proceeding, and the parcel registered is indexed in the "Cadaster," which is the assessment book and land tax map of the locality. Each parcel is carefully described in this book, the name of its owner is stated, and its condition, area, tax valuation and improvements are set forth. On every change of title, this record on the "Cadaster" is immediately and accurately brought down to date.[17] As a rule there is no indemnity fund provided for in this Teutonic system, but the validity of the title rests on the Court's decree and the subsequent accurate performance of their duties by the officers in charge of the "Cadaster."[18] The fact is worthy of emphasis that official registration of titles, and giving to them practical security without the work of repeated examination as they pass hands, has thus been brought about in the German-speaking countries with respect to titles which, in comparison with those of America, were very ancient when the system was inaugurated.

Among English-speaking peoples, the first title registration law was passed in South Australia in 1858, through the efforts of Sir Robert Richard Torrens, then premier of the Parliament of that country. Hence, the name—"Torrens System," which has been given to similar legislation in England and this country. Substantially the system which was thus introduced into Australia, has spread over all Australasia, Southern Africa, most of the Dominion of Canada, and the British dependencies generally, and, under the designation of Lord Cairns' Act, passed in 1875, and amended in 1897, is now operative as a compulsory system throughout the entire County of London.

There are, of course, many variations in the local laws that embody this system. But the fundamental principle and purpose

[16]Morris on Land Registration, pp. 98-106.

[17]Report of Land Commissioner C. Fortescue Brickdale to the British Parliament in 1896.

[18]Morris on Land Registration, pp. 100-106.

of all of them are to establish and certify to the ownership of an absolute and indefeasible title to real property, *without requiring any judicial proceeding for that purpose,* and to simplify and expedite the transfer of such property. Proceeding under this system, he who claims to own the land files with the Registrar an application for its registration, and also his muniments and evidences of title. The application sets forth the names and addresses of all persons interested in the property, and of the adjoining owners. The Registrar examines the title thus presented; and, if he approves of it, has notice served on all interested parties, in the manner prescribed by the statute, calling on them to show cause, if any exist, why, within a time designated, varying from three weeks to three months, the title should not be registered. At the expiration of the period thus fixed, if no objection is interposed, the title is registered and set out on a certificate in a book kept for that purpose, showing the ownership of the property, and all mortgages, liens and encumbrances thereon. The certificate of this registration issued to the owner is his practically conclusive evidence of title. The interest thus registered is made by the statute indefeasible in the hands of a *bona fide* purchaser or encumbrancer for value; but it is usually made subject to certain exceptions, such as fraud, easements, taxes and assessments, and short leases.

Beginning with the State of Illinois in 1895, registration of titles as such has been provided for by statute in seven of the United States, namely, Illinois, Massachusetts, Minnesota, Colorado, California, Oregon and Washington. Such a statute was enacted in Ohio in 1896; but was so loose and inaccurate that it was declared to be unconstitutional,[19] and was repealed in 1898. The registration system, being a radical innovation in the States where it has been adopted, has had to make its way against some natural prejudices, much *ultra* conservatism and not a little interested opposition on the part of established agencies for examining and re-examining titles. It is making its way, however, with increasingly important results, especially in the more densely populated localities. Thus it is employed, to a reasonable extent, in Chicago, and is making marked beneficial progress in Massachusetts, and particularly in the City of Boston.

The most important distinction between an American Title

[19]State *v.* Guilbert (1897) 56 Ohio St. 575.

Registration Law and that of England, Australia, or Canada, is that the former—the American Statute—like its Teutonic cousin, uniformly requires a judicial proceeding and determination of the title, as a prerequisite to its effectual registration. This, of course, is because of the exact observance and enforcement of our constitutional guarantee that no one shall be deprived of his property without due process of law. In most of the States where the system has been inaugurated, its constitutionality on this ground has been tested and sustained by the highest State courts.[20]

The Massachusetts case, *Tyler* v. *Judges,* was carried to the Supreme Court of the United States;[21] and the result of its review there was recently summarized by Judge Davis of the Land Court of Massachusetts as follows:[22]

"When we got to Washington, the Federal Court took the ground, in a divided opinion, that the question presented was not a Federal matter. The basis of that opinion was a position which I think the Court had previously taken in a recent Texas case, that of *Roller* v. *Holly.*[23] Under the Federal Constitution no one can be deprived of his property without due process of law, whether the form of action in which he failed to receive reasonable opportunity to be heard was *in personam* or *in rem,* under a registration case or a probate statute, a suit in equity, an admiralty libel, or a tax proceeding. With the general question of the constitutionality of a particular act or process the Federal Court may not be in any way concerned. Even where a statutory proceeding is declared to be entirely constitutional in itself, as was the case both in *Roller* v. *Holly* and in *Tyler* v. *Judges,* yet if the act be maladministered so as to result in any particular instance in a deprivation of property without reasonable opportunity to be heard, that particular action may be held unconstitutional for want of due process of law, though all other acts under the same proceeding be perfectly valid. There is nothing in this peculiar to registered titles. Unregistered titles are much more exposed to the same danger. The difficulty with our learned opponent in *Tyler* v. *Judges* was that he had had full opportunity to be heard. In other words, the Federal Court, as I understand the matter, held that the general constitutionality of

[20]Tyler *v.* Judges (1900) 175 Mass. 71; People *v.* Simon (1898) 176 Ill. 165; Glos *v.* Hallowell (1901) 190 Ill. 65; Gage *v.* Consumers' Electric Light Co. (1901) 194 Ill. 30; State *v.* Westfall (1902) 85 Minn. 437; Title etc. Restoration Co. *v.* Kerrigan (1906) 150 Cal. 289; Robinson *v.* Kerrigan (Cal. 1907) 90 Pac. Rep. 129; People *v.* Crissman (Col. 1907) 92 Pac. Rep. 949.

[21](1900) 179 U. S. 405.

[22]Address before N. Y. State Bar Ass'n, Jan. 25, 1908.

[23](1900) 176 U. S. 398.

our act is not a proper subject for Federal decision. There has not been any other attempt made to test it, nor in the ten years in which it has now been in operation has any charge arisen that any one has been deprived of any estate or interest in land without reasonable opportunity to be heard."

In the State of New York, since the time of the agitation between 1884 and 1887, which resulted in the establishment of the block index system in New York City, it has become more and more apparent with the advance of years that a fundamental reform in dealing with titles must ultimately be found. The outcome of this has been the introduction in the legislature, from time to time, of bills providing for the registration of *titles*. Most of these have been drawn from the so-called Torrens Laws of the other States, and have failed to take into account sufficiently the special statutes and local laws and customs of this State. Pursuant to Chapter 628 of the Laws of 1907, a commission was appointed by Governor Hughes, to investigate the entire matter and to report to the legislature on or before February 1st, 1908. The majority report of that commission, made by four of its seven members, submitted a bill for the registration of titles, which, as Chapter 444 of the laws of 1908, has been made a part of the statute law of the State. Its intended operation may be summarized as follows:

Any one who owns or is about to acquire a piece of real property may have the title examined by an official examiner, who may be a lawyer or a title guarantee company, licensed by the Supreme Court in the manner to be prescribed by the Court of Appeals. The official examiner, employed and paid by the landowner or purchaser, after a thorough examination of the title, prepares a certificate thereof, substantially in the form prescribed by the statute. He also has a survey made and certified by a competent surveyor. Up to this point, no public official as such has been employed. The title may now pass in the ordinary way, and the possession of the land and all other dealings with it will be practically unaffected by the subsequent proceedings for its registration.

Those proceedings are commenced by the filing of the certificate above described, and of a notice of the pendency of the proceedings, and of a complaint, the general form of which is prescribed by the statute. These papers go to the Supreme Court, at Special Term, and are to be examined carefully by the Court. Any other docu-

ments or evidences may be demanded by the Court, to satisfy it as to the condition of the title. If it appears that the plaintiff has a good title, the issuing and service of a summons, containing a notice of the object of the action and describing the property, are ordered by the Court. This service is made personally on all the defendants who do not voluntarily appear and who can be so served within the State, and other defendants are served by publication or other form of substituted service as prescribed by the statute. The defendants are all persons ascertained to have any interest or right in or claim upon the property, and the owners of the adjoining lands, and the people of the State of New York, and "all other persons, if any, having any right or interest in or lien upon said property or any part thereof." By the statute, the Court is made the ultimate judge of the sufficiency of the evidence as to who are necessary parties, and whether or not they can be personally served within the State, and no attack on the Court's decision as to these matters can be effectual after six months from the time of the entry of the judgment of registration. Pursuant to that judgment, which in most cases will be taken by default, the Registrar, who is a County Official (the County Clerk or Register, as the case may be), enters upon a certificate, properly prepared and bound in a book, the name of the owner of the land, a statement of how and under what conditions he owns it, and a description of all mortgages and other liens, charges, rights and claims thereon. This certificate completely and accurately sets forth the title to the property. A duplicate certificate is delivered to the owner.

All subsequent transactions with the property so registered (except judgments and decrees of the United States Court, taxes, water rents and assessments, easements that do not become matter of record, and leases for a year or less) must be noted on the certificate, in order to become effectual. All transfers, mortgages, leases, judgments, mechanics' liens and all other liens, charges and encumbrances (except the few above specified), as they may arise against the property, are thus required to appear upon the certificate which thereby is kept a constant and accurate record of the title. The judgment of the court makes this certificate conclusive evidence in favor of any one who, after it is duly made, is an innocent purchaser or encumbrancer of the property for value without actual notice of any fraud in procuring the registration. The certificate also becomes conclusive evidence of the owner's title, though

retained by him, at the end of six months after the judgment is entered, unless such owner was guilty of fraud in obtaining the registration. A certificate obtained by fraud is voidable against the fraudulent taker, and against those who acquire any interest in the property other than as innocent purchasers or encumbrancers for value without notice, for ten years after the registration. An assurance fund is provided for by the statute, in favor of those who elect to contribute thereto one-tenth of one per cent. of the assessed valuation of their properties. But this fund is to secure registered owners against defects which may arise in their titles (as, for example, by negligence of officials) *after* they have been registered. The judgment of the Court, pursuant to which the initial registration is made and in the procuring of which all interested persons are given their "day in Court," obviates the necessity for any further assurance or guarantee funds to be held or controlled by the public.

This new law of New York, in addition to aiming like all statutes for registration of titles at ultimate quick and inexpensive transfer, has a number of features peculiar to it, which are regarded by its framers as particularly important. Prominent among these are the following:

(1) Its operation is purely voluntary; and it calls for no expense on the part of the public, except in so far as it is put into practical use in the registration of titles. Thus, it can do no harm to any part of the State where its use may not be desired. Yet it is believed to embody sufficient inducements to the average owner of real property, especially in the great cities, to cause it to be effectually though gradually adopted as a practical working system of dealing with titles.

(2) Unlike other registration laws, this statute provides for official examiners who are not to be paid by the State, and the appointment of whom is to afford no opportunity for patronage. They are to be licensed by the Appellate Division of the Supreme Court, pursuant to rules to be prescribed by the Court of Appeals; but their work is to be for the landowner, and their payment is to come directly from him. Around these official examiners, however, are thrown the very effective safeguards of the requirement of an absolute ten years' guarantee when the work is done by a title insurance company, and by declaring that a false certificate or statement intentionally made by an individual examiner shall be a

felony, punishable by a fine of five thousand dollars, or five years' imprisonment, or both.

(3) By requiring an accurate and verified survey for each piece of property registered, the statute provides for the gradual settlement of the questions of boundaries which cause so much trouble in conveyancing at the present time. The judgment of the Court, based on the survey and made in an action to which the owners of the adjoining lands are parties, fixes the boundaries of each piece of land as it is registered; and, when an adjacent lot is registered, its survey must be made to harmonize with that of the previously registered parcel. Thus, without material public expense, one of the most fruitful causes of litigation in connection with real property should be gradually removed.

(4) After providing for the making of all interested persons parties to the proceeding, the statute declares:[24]

"The question of the sufficiency of the proof that all such owners and claimants who could be found by diligent inquiry are duly and specifically named and made parties to the action shall be for the Court; its decision that such proof is sufficient shall be shown by its making the order for the service of the summons and the commencement of the action as prescribed in this act, and such decision or order shall not be drawn in question after six months from the time when the final judgment in the action is entered."

Likewise as to the sufficiency of the proof on which substituted service is ordered, the statute provides:[25]

"Before making an order for service of the summons and said notice by publication or other form of substituted service, the Court must be satisfied by proof of the facts that the plaintiff has been or will be unable, with due diligence, to make personal service of the summons. The question of the sufficiency of such proof shall be for the Court; and an allegation, in an affidavit or other duly verified statement recited in said order, that the plaintiff has been or will be unable with due diligence to make personal service of the summons, or that after diligent inquiry a defendant remains unknown to the plaintiff or that the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state, may be taken to be sufficient proof thereof. An order containing such a recital, and made on such proof, shall not be drawn in question after six months from the time when the final judgment in the action is entered."

Thus, while the Court is required to see to it that personal service on a defendant is made whenever possible, yet many of the

[24]Section 12. [25]Section 17.

perplexing questions now met by conveyances because of actual or possible defects in affidavits for obtaining orders for service of the Court's process by publication should by these sections be eliminated from proceedings under this statute. Either each defendant will be personally served, or, after the Court has properly decided that he cannot be so served, he will be duly served by publication or other form of substituted service.

(5) The difficulties, real or fancied, which have been said to be found in registration statutes because of the apprehension that one man may register as his own the land of another, are minimized in this law by a provision[26] for the filing and proper indexing of a cautionary notice by any landowner, in such manner that he must be made a party to proceedings by any other person for the registration of the land.

It may be said, in closing, that the new law rests on a principle of procedure which the State needs and sooner or later must have adopted into its system of jurisprudence—a requirement that titles to the property which is at the base of our economic structure shall be settled and made practically unassailable and then shall be retained in that condition and capable of quick and easy use and manipulation. Time will reveal the defects in the plan adopted to accomplish those results; and it may be that the remedies which experience will suggest for those defects may lead to very radical changes; but the innovation as a system, like many other statutory reforms in which New York has taken the lead, has undoubtedly come to stay.

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[26]Section 15.

THE SHERMAN ANTI-MONOPOLY ACT AND PROPOSED AMENDMENTS.

The Sherman Anti-Monopoly Act, approved July 2, 1890, was one of a series of enactments which during the last thirty years have been popular with the noisy part of the American people. An abuse is discovered. Immediately a cry is raised against the use of the thing which has been abused, and an application is made to the Legislature to prohibit its use altogether.

In the case of the Sherman Anti-Monopoly Act, the abuses were manifold and certainly did require remedial legislation. Before considering the amendments to this Act which have been proposed, it will aid us to follow the familiar rule for the construction of statutes, and consider the occasion and necessity of the law, the mischief felt, and the objects and the remedy in view.

Experience showed a tendency among the holders of capital to combine. These combinations in many instances, as in the case of railroads, were of public benefit, and tended to facilitate the business of the country, and had greatly reduced the cost of transportation. But other combinations had attempted to drive competitors out of business, not by producing a better article or selling continuously at a lower price, but by methods which, whether tolerated or not at common law, were morally indefensible. To use the language of Mr. Justice Holmes in his dissenting opinion in the *Northern Securities Case*[1]:

> "The objection * * * was not the union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared."

This "ferocious extreme of competition" had been exercised in various ways. One was that proved in the *Dressed Meat Case*.[2] Here a combination would put up prices at the stock yards for a few days, with the object of inducing large shipments of cattle. When these shipments had arrived the price would be dropped, and thus the price to the producer was steadily kept down. As part of the same device, the parties to the combination agreed to

[1] (1904) 193 U. S. 197, 405. [2] Swift *v.* U. S. (1905) 196 U. S. 375.

avoid bidding against each other, to restrict shipments, and to refuse to sell to dealers who would not agree to buy exclusively from the combination.

Another method adopted by these combinations was to ruin a competitor by putting the price of the commodity he dealt in down to a point at which there was no profit in the business, using the advantage of the combination's larger capital to maintain this low price until the competitor was excluded from the trade. Then the price was raised. Another method resorted to was to fix the price of a commodity by agreement between the parties and refuse to sell to any persons who were not members of the combination.[3]

It was unfortunate that the legal advisers of the Government did not confine their proceedings to cases of this description. They were frequent. They caused great injury to the public, and they had the result of driving small dealers out of business. But one of the first actions brought by the Attorney-General under the power given by the fourth section of the Sherman Act was brought to restrain the enforcement of an agreement made by railroad companies west of the Mississippi, to enable them to carry out the provisions of the Interstate Commerce Act in regard to the uniformity of rates.[4]

In these cases the Supreme Court held that it would enforce the provisions of the Act without limitation by judicial construction. This construction of the Act is perhaps most clearly expressed in the recent case of *New York, New Haven & Hartford R. R.* v. *Interstate Commerce Commission.*[5] Here the Chesapeake & Ohio R. R. Co. made a contract with the New Haven Railroad by which the former was to sell coal to the latter at a price which would net the former less than the published rates for carrying coal. The Court held this to be illegal. The Chesa-

[3]This was the method adopted in Montague *v.* Lowry (1904) 193 U. S. 39.

It was substantially adopted in the cases of the City of Atlanta *v.* Chattanooga Foundry & Pipeworks (1903) 127 Fed. 23; (1906) 203 U. S. 390; U. S. *v.* Addyston Pipe & Steel Co. (1899) 175 U. S. 211; and U. S. *v.* Coal Dealers' Ass'n of California (1898) 85 Fed. 252.

Perhaps the first recorded instance is in the book of Revelation, XIII, 17: "That no man might buy or sell, save he that had the mark, or the name of the beast."

[4]U. S. *v.* Trans-Missouri Freight Ass'n (1897) 166 U. S. 290. A similar decision is U. S. *v.* Joint Traffic Ass'n (1898) 171 U. S. 505.

[5](1906) 200 U. S. 361.

peake & Ohio Company claimed that its dealings in coal would stimulate the production of coal, encourage an industry which was tributary to the railroad, and thus indirectly benefit the whole territory of which it was the outlet. On this contention the Court said[6]:

"We think it is shown that the mode of dealing adopted was simply the result of a disregard by the Chesapeake & Ohio of the economic conceptions upon which the Interstate Commerce law rests, and the substitution in their stead of the conceptions of the Chesapeake & Ohio, as to what was best for itself and for the public."

It is true that this decision was based upon the Interstate Commerce Act. But the principle thus expressed is distinctly that which the Court had adopted in construing the Sherman Anti-Monopoly Act. Perhaps the only limitation upon the general terms of that Act which the Supreme Court has held to be implied is this: a combination to fix the prices of patented articles and the terms upon which they may be used, is held not to be illegal.[7]

Another limitation which it was sought to import into the Act was an application of the rule of the common law that a person selling a business could lawfully make a contract that he would not engage in competition with his vendee. It is quite possible that in case of a sale by a private citizen this rule may still be applicable. But it would seem to follow from the decision in the *Northern Securities Case*[8] that it does not apply to a sale by a corporation nor to a corporation formed for the purpose of acquiring the stock of other corporations. The doctrine of this case has been so much discussed and is so familiar to the profession that it seems unnecessary to do more than refer to it.

It will be seen from this brief review of the decisions under the Sherman Act that it has been extended to prohibit contracts which were not within the mischiefs at which its framers aimed. On the other hand a construction has been given to the seventh section which certainly limits very seriously the right of action given by that section. This gives a right of action to an individual for an injury to "his business or property," by reason of anything

[6] P. 398.

[7] Bement *v.* National Harrow Co. (1902) 186 U. S. 70; Rubber Tire W. Co. *v.* Milwaukee etc. Co. (1907) 154 Fed. 358.

[8] (1904) 193 U. S. 197.

forbidden or declared to be unlawful by the Act, and gives to the injured party the right to recover "three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." Here again it may justly be said that the language of this Act is too sweeping. It is quite conceivable that there might be technical violations of the Act for which it would be unjust to award treble damages. But on the other hand it is obvious that in many cases it would be impossible for a plaintiff who had been driven out of business to give any precise evidence of the amount of his injury. In the case of *Montague* v. *Lowry*,[9] for example, the plaintiffs, by the combination there under consideration, were driven out of the business of dealing in tiles. How much they would have added to their general business had they been able to continue dealing in tiles, manifestly it would be hard to prove. The verdict in that case was for $500 only. Any one who reads the statement of facts will perceive that the actual damage to the plaintiffs must have been very much larger, and that the trebling of the verdict even did not give adequate compensation.

In a recent unreported decision of Judge Hough in the U. S. Circuit Court for the Southern District of New York, it was held that damages were not recoverable when a business was broken up by a combination which had been made illegal by the Sherman Act, unless the competitor driven out of business had actually begun to market his product. This was put on the ground that it could not be shown how much he would have marketed, and what profit he would have made on the amount so dealt in. From the judgment entered on this decision a writ of error has been prosecuted, and it would therefore be unbecoming to discuss the subject at length. Attention is, however, drawn to it because of the obvious difficulty of proving damages in such case, even if they are recoverable when proved. If not recoverable there is obviously a defect in the statute. The tort is quite as great if it destroy *ab initio* a business which the law was intended to protect.

One other application of the Act which was probably not foreseen by its framers, must be considered before we take up the question as to the amendments that are proposed. It was held by the courts as long ago as 1893,[10] that the Sherman Act was

[9] (1904) 193 U. S. 38.

[10] Waterhouse *v.* Comer (1893) 55 Fed. 149, 156.

applicable to Trades Unions, and that any rule made by such a Union in violation of the terms of the Act was obnoxious to its provisions. This doctrine has very recently been approved and enforced by the Supreme Court in the *Danbury Hatters Case*.[11] This last decision aroused public attention. It is not perceived how the court could well have decided otherwise, in view of the express language of the Act, and in view of its previous decisions that it would enforce the Act according to its terms. These decisions were certainly in accordance with the well-settled rule for the construction of statutes stated by Chancellor Kent:

"General words in the statute must receive a general construction, and if there be no express exception the Court can create none."[12]

Accordingly, after much consideration a bill was introduced in the House of Representatives, March 23, 1908, "to regulate commerce among the several states or with foreign nations and to amend the act approved July 2, 1890, entitled 'An Act to protect Trade and Commerce against Unlawful Restraints and Monopolies.' This bill proposes to amend the Sherman Act by authorizing all corporations except those subject to the Interstate Commerce Act (that is to say common carriers) to register with the Commissioner of Corporations and to file with him a copy of any "contract or combination hereafter made other than a contract or combination with a common carrier." The Commissioner of Corporations, with the concurrence of the Secretary of Commerce and Labor, "may enter an order declaring that in his judgment such contract or combination is in unreasonable restraint of trade or commerce among the several states or with foreign nations." If no such order is made the contract is valid "unless the same be in unreasonable restraint of trade or commerce among the several states or with foreign nations."

The bill further provides that a common carrier may file with the Interstate Commerce Commission a copy of a contract or combination hereafter made. Thereupon the Interstate Commerce Commission may enter an order "declaring that in its judgment such contract or combination is in unreasonable restraint of trade or commerce among the several states or with foreign nations."

[11] Loewe *v.* Lawlor (1908) 208 U. S. 274.

[12] Demarest *v.* Wynkoop (1817) 3 Johns. Ch. at p. 142. To the same effect are Chamberlin *v.* Western Transportation Co. (1870) 44 N. Y. 305, 309; The Marianna Flora (1826) 11 Wheaton, 1, 39.

If no such order is made, no suit by the United States will lie respecting the same unless it "be in unreasonable restraint of trade or commerce among the several states or with foreign nations." This proposition introduces a novel element into federal legislation. It should not on that account be rejected, but it should on that account be scrutinized. In effect it authorizes an officer of the Federal Government to license a contract which is in reasonable restraint of trade, notwithstanding the fact that such contract is prohibited unless it is licensed, and it gives to the officers of the Federal Government very great power in the matter of the decision whether or not such contracts are or are not reasonable. The right to review the action of the Commissioner of Corporations is given to the Supreme Court of the District of Columbia. But no right is expressly given to review the decision of the Interstate Commerce Commission. Probably the Court would review such action without express grant of power. That Commission is certainly a quasi-judicial tribunal, whose decisions are entitled to great respect. If the power to license contracts by common carriers in restraint of trade should be lodged anywhere, that would seem to be the proper tribunal in whose hands the power should be placed. It is equally clear that there should be power somewhere to permit such contracts as were made by the Trans-Missouri Traffic Association. But the question recurs whether it would not be better to define in the Act itself the contracts which are deemed to be in reasonable restraint of trade, and to authorize those in express terms.

It has been said that no corporation is bound to avail itself of the provisions of this amendment, or to register in pursuance thereof unless it choose. That is perfectly true. But the compulsion to register created by the drastic provisions of the original Sherman Act is so great, that probably most corporations of importance would feel obliged to register under the Act if it should become a law. It may fairly be questioned whether the machinery of the Act does not impose upon the officers of the Government a burden much greater than that defensible upon any theory of wise legislation.

The bill then proceeds to take away the right to treble damages given by the seventh section of the original Act. No good reason is perceived for this particular change. There is no instance in which excessive damages have been recovered under the provisions

of the Sherman Act. In *Montague* v. *Lowry*, as has been pointed out,[13] the damages were probably inadequate. If the ruling of Judge Hough should be sustained, recovery in many cases would be nominal. If this section is to be altered, it would seem to be wiser in cases where a wilful violation of the Act should appear and a wilful tort should be proved, to give to the jury the right to find a verdict for exemplary damages. In this way compensation might be made for a wilful wrong which would be fairly adequate.

One further question remains to be considered. The constitutionality of the proposed legislation has been assailed on the ground that Congress has no right to delegate its power in the premises. This objection would seem to arise from a misapprehension of the scope of the proposed legislation.

The legislature may constitutionally entrust to a commissioner or officer of the Government power to make regulations for the enforcement or application of general rules prescribed by statute, and the regulations so adopted have the force of law. The regulations prescribed by the Secretary of the Treasury in reference to the importation of foreign goods, and the payment of duties thereon have the force of law.[14] Regulations adopted by the commissioners of pilots, pursuant to authority conferred by statute, are binding.[15] Regulations adopted by the Secretary of the Treasury fixing the authority of agents of the Secret Service Division have the force of law.[16] The power conferred on the Secretary of the Interior to make rules respecting cutting timber on the Government lands is not a delegation of legislative power. The rules will be enforced by the courts.[17]

The whole body of Civil Service legislation rests on this principle. The action of the Executive in prescribing regulations pursuant to these statutes is constitutional.[18]

The action of the Executive in such cases is subject to review by the courts. The courts will not, however, review this decision in a collateral suit, as, for example, in a taxpayers' action.[19]

[13] P. 455.

[14] Gratiot *v.* United States (1846) 4 How. 80; *Ex parte* Reed (1879) 100 U. S. 13.

[15] Sturgis *v.* Spofford (1871) 45 N. Y. 446.

[16] United States *v.* Fuelhart (1901) 106 Fed. Rep. 911.

[17] United States *v.* Williams (1887) 6 Mont. 379.

[18] Opinion Sup. Ct. Mass. (1885) 138 Mass. 601; Butler *v.* White (1897) 83 Fed. Rep. 578; People *v.* Civil Service Boards (1886) 103 N. Y. 657.

[19] Chittenden *v.* Wurster (1897) 152 N. Y. 345.

The subject was fully considered in the case last cited. On page 363 the Court said:

"If the Mayor refuses to do his duty, or if he does it improperly, he may be compelled by direct proceeding, as by mandamus, or perhaps in some cases by certiorari, instituted by any resident citizen, to do it in accordance with the requirements of the Constitution and of the statute. The courts have the power to compel the discharge of such duties."[20]

In cases of removal the rule is thus stated in *People* v. *Brady*.[21]

"The reasons assigned for the removal must appear, upon their face, to justify the action; in other words, they must be substantial and not frivolous, but when they appear to be sufficient to justify the determination the courts have no power to interfere on the ground that the reasons, though good in themselves, had no existence as matter of fact, or that the explanation given by the subordinate should have satisfied the head of the department."

Under the Interstate Commerce Law there have been numerous decisions in suits which involved a review by the courts of the validity of the orders of the commission. But this review is expressly provided for by Section 16 of the Act, which makes the findings and order of the commission *prima facie* evidence of the facts therein stated. Additional evidence is taken before the court in the proceeding to enforce the order of the commission. This is really in the nature of a new trial, subject to the qualification that in the absence of new evidence the findings of the commission would be sufficient evidence of the facts.[22] These decisions therefore do not aid us much in the consideration of the general question. They rest upon the terms of the Act itself.

The cardinal rule which should be observed in framing anti-monopolistic legislation should be that which Chief Justice Jay declared to be one of

"the great and leading principles of a free and equal national government, one of the great objects of which is to insure justice to all: To the few against the many, as well as to the many against the few."[23]

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[20]A review in such cases will be had only where there has been plainly an abuse of discretion. *People* v. *McWilliams* (1906) 185 N. Y. 92; *Matter of Dill* (1906) *ibid.* 106.

[21](1901) 166 N. Y. 44.

[22]Western New York Co. *v.* Penn. Refining Co. (1905) 137 Fed. Rep. 343; 70 C. C. A. 23; Tift *v.* Southern R. Co. (1905) 138 Fed. Rep. 753, aff'd. (1906) 148 Fed. Rep. 1021; Cincinnati &c. R. Co. *v.* Interstate Commerce Commission (1895) 162 U. S. 184, 196.

[23]Chisholm *v.* Georgia (1793) 2 Dallas 419, 477.

There should be no wrong done by one citizen to another, for which the Courts of justice will not, in due course, afford a speedy remedy.

"*Ubi jus, ibi remedium,*" was a maxim of the common law. The twentieth century ought not to be less civilized than the sixteenth.

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THE EVOLUTION OF THE ENGLISH JOINT-STOCK LIMITED TRADING COMPANY.

VII.—Trading Companies Incorporated under General Act of Parliament.[1]

On September 5th, 1844, there was also passed "An Act for the Registration, Incorporation and Regulation of Joint-Stock Companies."[2] Its first section applied to every joint-stock company (as thereinafter defined) established in England or Ireland, or established in Scotland and having an office or place of business in any part of the United Kingdom,

"for any commercial purpose, or for any purpose of profit, or for the purpose of assurance or insurance (except Banking Companies, Schools, Scientific and Literary Institutions, Friendly Societies, and also Benefit Building Societies, respectively duly certified and enrolled under the statutes in force respecting such Societies, other than such Friendly Societies as grant assurances on lives to the extent hereinafter specified)."

Section 2 provided that the term "Joint-Stock Company" should "comprehend"

"every partnership whereof the capital is divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the co-partners,"

Assurance Companies (as thereinafter defined) including certain insuring Friendly Societies, whether the same should

"be Joint-Stock Companies or Mutual Assurance Societies or both,"

and

"every partnership which at its formation, or by subsequent admission (except any admission subsequent on devolution or any other act in law) shall consist of more than twenty-five members."

The same section went on to provide that the Act, except where expressly applicable thereto, should not apply to (*a*) partnerships existing before the first of November, 1844, (*b*) any company for executing such works as bridges, canals, reservoirs, railways, harbors, and the like, which could not be executed without Parliamentary authority,

[1]Sections I-VI appeared in the preceding number. VIII Columbia Law Review 339.

[2]7 & 8 Vict. c. 110.

(*c*) "Any Company incorporated or which may be hereafter incorporated by statute or charter," or (*d*) "Any Company authorized or which may be hereafter authorized by statute or letters patent to sue or be sued in the name of some officer or person."

By section 4, before even advertising the intention or proposal to form a company within the Act (whether for executing works under Parliamentary authority or not) the promoters had to file with the Registrar of Joint-Stock Companies a return of the proposed name of the company, its business or purpose, and the names, addresses and occupations of the promoters. Upon registration of these particulars the promoters were entitled to a "Certificate of Provisional Registration." But this did not incorporate the company; any joint-stock company thereinafter formed for any purpose within the Act could only act "provisionally" until it had obtained a "Certificate of Complete Registration,"[3] that is to say,[4] the promoters could assume the name of the intended company coupled with the words "Registered Provisionally"; they could open subscription lists; allot shares and receive deposits thereon; and perform such other acts as were necessary for constituting the company, or for obtaining letters patent or a charter, or an Act of Parliament. But either before or after publication of the prospectus or advertisement, as soon as the further matters were decided on, there had to be registered other particulars, such as the situation of the company's place of business, the names, etc., of the formation committee, officers and subscribers, and (before circulation) a copy of every prospectus or advertisement as to the formation of the company. The certificate of complete registration could not be obtained until the company had been "formed" by a deed of settlement which contained provisions similar to those now found in the memorandum and articles of association of a company. In the case of a company for executing a railway or other work requiring Parliamentary authority, instead of a deed of settlement, there had to be filed copies of the documents required to be deposited under the Standing Orders of the two Houses of Parliament.

By section 25, on complete registration being certified, the

"Company, and the then shareholders therein, and all the succeeding shareholders, whilst shareholders, [became] incorporated as from the date of such certificate by the name of the Company as

[3]By Section 7. [4]By Section 23.

set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the Company was formed, but only according to the provisions of this Act, and of such deed * * * and for the purpose of suing and being sued, and of taking and enjoying the property and effects of the said company * * *,"

with power (*inter alia*) to use the registered name of the Company, adding thereto "Registered"; to have a common seal; to sue and be sued in the registered name; to hold lands as a place of business, but not, without license, generally; to issue share certificates and borrow moneys. Certain restrictions were placed on companies formed to execute works requiring the authority of Parliament.

The Act contained eighty sections, many of which were such provisions as to management, auditing, etc., as are to be found practically to the same effect in the most stringent modern provisions of the existing Companies Acts.

Existing "Joint-Stock Companies" were not quite left alone, for section 58 provided that all of them to which the Act applied

"whether incorporated by Act of Parliament or by charter, or privileged by letters patent, or established by a deed of settlement, or any other instrument, or by virtue of any other authority whatever or in any other way whatever"

should, under penalties, before the first of February, 1845, register some small particulars. If they complied they were entitled *gratis* to a certificate of registration, which, however, gave them no powers or privileges under the Act; but facilities were given for complete registration of then existing companies (other than Assurance Companies). Many of them had no advantage to gain by obtaining complete registration, for the Act *did not limit the liability of members.*

By section 66 a judgment against a company completely registered

"except companies incorporated by Act of Parliament or charter, or companies the liability of members of which is restricted by virtue of any letters patent,"

could be enforced by execution not only against the assets of a company but also against the property of any shareholder who had not ceased to be such for three years. And by section 67 a shareholder who had suffered from execution had a remedy over against the company.

By the Limited Liability Act, 1855,[5] any joint-stock company thereafter formed under the 7 & 8 Vict. c. 110[6] (other than an assurance company) with a capital divided into shares of a nominal value of not less than £10 each, and any solvent joint-stock company (except as aforesaid) already registered under the Act 7 & 8 Vict. c. 110, and any solvent joint-stock company (except as aforesaid) constituted under any private Act of Parliament, was enabled to obtain a certificate of complete registration "with Limited Liability" on complying with the requirements of the Act as to registration, etc. The company had to take the word "Limited" as the last word of its name, and[7] its members were not liable under any judgment against the company, or for any of its debts or engagements, except where execution against the company failed to realize sufficient, in which case the execution might be ordered to be issued against any shareholders to the extent only of the portions of their shares not then paid up. When three-fourths of the capital of such company had been lost the directors had to take steps to dissolve and wind it up.[8]

The Joint-Stock Companies Act, 1856[9] somewhat hastily repealed the 7 & 8 Vict. c. 110,[10] and an Act slightly amending it,[11] and the Limited Liability Act, 1855,[12] but provided that the repeal should not take effect as to any company completely registered under the 7 & 8 Vict. until such company had obtained registration as thereinafter mentioned. Its 108th section provided that certain Winding-up Acts should not apply to companies registered under the Act of 1856, or under the 7 & 8 Vict. after they had been registered under the Act of 1856. Section 110 required that every company registered under 7 & 8 Vict. should, before the third of November, 1856, and that any other company duly constituted by law before the Act of 1856 and having seven or more members, might at any time thereafter, register itself as a company under the Act of 1856 either with or without limited liability, but registration with limited liability was only allowed when the company had either obtained registration under the Act of 1855,[13] or had obtained the

[5] 18 & 19 Vict. c. 133.

[6] "An Act for the Registration, Incorporation and Regulation of Joint-Stock Companies," 1844, *supra*.

[7] By sections 7 and 8. [8] By section 13.

[9] 19 & 20 Vict. c. 47 (by Section 107).

[10] *Supra*. [11] 10 & 11 Vict. c. 78. [12] 18 & 19 Vict. c. 133, *supra*.

[13] 18 & 19 Vict. c. 133, *supra*.

assent of a certain majority of its stockholders. Section 111 pointed out the requirements for registration of existing companies. Section 2 provided that the Act should not apply to persons associated together for the purpose of banking or insurance. Section 4 prohibited under penalties, after November 3d, 1856, the carrying on in partnership by more than twenty persons of any trade or business having gain for its object, unless such persons were registered under the new Act, or were authorized to trade by some private Act of Parliament, or by Royal Charter, or letters patent, or were working mines within the jurisdiction of the Stannaries.

Many of the provisions of the Act of 1856 were practically, if not exactly, the same as those of the existing Companies Act, 1862.[14] As to new companies, seven or more persons by signing a "Memorandum of Association," and complying with the requirements as to registration, were enabled[15] to form themselves into an incorporated company with or without limited liability. This memorandum had to state the name of the company, the part of the United Kingdom—England, Scotland or Ireland—in which the registered office of the company was to be; the objects of the company; whether the liability of the shareholders was to be limited or unlimited; the amount of nominal capital; and the number of shares into which the capital was divided and the amount of each share. In the case of a limited company, "Limited" had to be the last word in the name of the company. By section 8 each subscriber of the memorandum had to sign for at least one share. The memorandum was the charter or constitution of the company. It might or might not be accompanied by another document, signed by those who had signed the memorandum, called the "Articles of Association," and "prescribing regulations for the company." If there were no articles, regulations in Table B in the schedule to the Act[16] were the company's articles; these, however, could be modified or excluded altogether by articles filed with the memorandum, or subsequently adopted in the prescribed manner. But[17] articles were to be in a form set forth in Form C in the schedule "or as near thereto as circumstances will admit." The Form C provided among other things as follows:

[14] 25 & 26 Vict. c. 89. *infra*, p. 469. [15] By section 3. [16] Section 9.
[17] By Section 10.

"No shareholder shall transfer his shares without the consent of the directors expressed in writing. * * * If any shareholder feels aggrieved with the refusal of the directors to allow him to transfer his shares, the matter shall be settled by arbitration."

The memorandum and articles, if any, were to be filed with the Registrar of Joint-Stock Companies, who thereupon certified that the company was incorporated, and in the case of a limited company, that it was limited; and, the section[18] went on to provide,

"The subscribers of the memorandum of association, together with such other persons as may from time to time become shareholders in the company, shall thereupon be a body corporate by the name prescribed in the memorandum of association, having a perpetual succession and a common seal, with power to hold lands, but with such pecuniary liability on the part of the shareholders as is hereinafter mentioned."

Section 14 provided that the directors should be liable for debts if a dividend was paid when the company was known to be insolvent. In a note, Mr. Thring, in an early edition of his book on Companies, says:

"This section was introduced into the Bill during its progress through the House of Commons. It is copied from a New York Statute, and is inconsistent with the remainder of the Act. The language is so inaccurate that the clause will probably have no effect at all."

But this was written forty-six years ago.

Section 20 prescribed a form of transfers of shares. By section 22

"the amount of calls for the time being unpaid on any share shall be deemed a debt due from the holder of such share to the company."

Section 33 enabled a company registered under the Act to alter or make new provisions in lieu of any of its regulations—not its memorandum—whether contained in Table B or in separate articles—by a "special resolution."[19] Section 37 enabled a company, if so authorized by its regulations, to increase its capital, which was, of course, an alteration of one provision of its memorandum of association. By section 39, carrying on business beyond a certain period with less than seven members rendered the survivors personally liable for the company's debts.

[18]Section 13. [19]Defined in section 34.

Part III of the Act contained elaborate provisions for the winding-up, not only by the Court but voluntarily of all companies registered under it or under the Act 7 & 8 Vict.[20] from and after the date at which the latter had obtained registration under the Act of 1856. Section 61 provided that in winding-up the existing shareholders should be liable to contribute to an amount sufficient to pay the debts of the company and the expenses of winding-up,

"with this qualification, that if the company is limited, no contribution shall be required from any shareholder exceeding the amount, if any, unpaid on the shares held by him."

The Act, of course, contained some provisions exonerating past shareholders.

Apparently, the old companies did not come cheerfully under the Act of 1856, so by section 23 of the Joint-Stock Companies Act, 1857,[21]—section 107 of the 1856 Act[22] was itself repealed, and the three acts thereby repealed[23] were to be deemed to have been and to be still unrepealed as to any company completely registered which had not obtained registration under the 1856 Act, until it had obtained registration under the Acts of 1856 and 1857, as from which time only the revived Acts were to be deemed repealed as to such company. If default was made by not registering by that date, the company was incapable of suing of paying dividends until it did register, but the default did not make the company an illegal one.[24] Section 29 enabled but did not require companies of seven or more shareholders, with a fixed capital in shares, and duly constituted by law before the Act of 1857, to register under the Acts of 1856 and 1857, either with or without limited liability, but if without limited liability already, certain assents had to be obtained to registration with limited liability. Section 3 repealed section 4 of the 1856 Act and provided that if after July 13th, 1857, more than twenty persons carried on in partnership any trade or business having for its object the procurement of gain to the partnership, then unless such persons were (1) a company registered under the Act of 1856, (2) a company incorporated or otherwise legally constituted by or in pursuance of

"some Act of Parliament, Royal Charter, or letters patent,"

or (3) engaged in working mines in the Stannaries jurisdiction,

[20] *Supra*, p. 461. [21] 20 & 21 Vict. c. 14. [22] 19 & 20 Vict. c. 47, *supra*.
[23] *Vid. supra*, p. 464. [24] By section 28.

every one of such persons should be severally liable for all the debts of the partnership. Section 5 enabled every limited company by special resolution to turn its fully paid shares into stock. Section 17 gave power to liquidators in a voluntary winding-up to sell the whole or part of the company's property to another company for shares in the latter. By section 25 when any company completely registered under the 7 & 8 Vict., had obtained registration under the Act of 1856 after November 3d, 1856, but before the passing of the Act of 1857, the registration was to be as good as if effected on or before November 3d, 1856. By section 26, section 110 of the Act of 1856 was repealed, and by the following section every company completely registered under the 7 & 8 Vict. that had been completely registered under the Act of 1855[25] (except Insurance Companies) was bound, under penalty, if not registered under the Act of 1856, to register under the 1856 and 1857 Acts on or before November 2d, 1857. Section 19 enabled the Court, instead of making a winding-up order, to make an order that a voluntary winding-up should be continued under the supervision of the Court.

The Legislature seems to have had great suspicions as to banks. By the Joint-Stock Banking Companies Act, 1857,[26] section 2 of the Act of 1856 was repealed so far as it related to persons associated together for the purpose of banking, subject to a proviso that no existing or future banking company should be registered as a limited company. A banking company of seven or more persons formed under 8 Vict. c. 113 was required to register under the new Act (with which the Joint-Stock Companies Acts of 1856 and 1857 were incorporated) on or before January 1st, 1858.[27] In case of default, besides certain named penalties, it was rendered incapable of suing or paying dividends, but was not an illegal company.[28] Banking companies of seven or more persons, having a share capital, and legally carrying on business before the passing of the Act, and not required to register, were permitted to do so under the Act, with the assent of a certain majority of the shareholders—*but not with limited liability.* On registration all provisions in any Act of Parliament, letters patent or deed of settlement constituting or regulating the company, which were inconsistent with the Joint-Stock Companies

[25] 18 & 19 Vict. c. 133, *supra.* [26] 20 & 21 Vict. c. 49.
[27] Section 4. [28] Section 5.

Acts, 1856[29] and 1857,[30] or with the new Act, were no longer to apply to the Company.[31] The 7 & 8 Vict. c. 113 and the 9 & 10 Vict. c. 75 were repealed as to any banking companies thereafter formed, and were, from the time when any company formed under them was registered under the new Act, to be repealed as to such companies, and thereafter such companies were to be regulated by a part of Table B of the Act of 1856, subject to the power of alteration given by that Act.[32] Seven or more persons associated for the purpose of banking were enabled to register themselves as a company under the Act (but not with limited liability) if the capital was divided into shares of not less than £100 each, and not more than ten persons were, after the passing of the Act, unless registered under it, to form themselves into a banking partnership, "or if so formed to carry on the business of banking."[33]

The Act 20 & 21 Vict. c. 78 contained certain provisions as to the rights of creditors of companies in winding-up or in a bankrupt state.

The Act 20 & 21 Vict. c. 80 provided that the Joint-Stock Companies Acts, 1856[34] and 1857,[35] should not be deemed to have repealed 7 & 8 Vict. c. 110[36] or any Act amending it, so far as concerned insurance companies already formed under that Act, or thereafter formed.

The Joint-Stock Companies Amendment Act, 1858[37] related almost exclusively to winding-up, enabling for that purpose certain partnerships to register under the Joint-Stock Companies Acts, 1857, or the Joint-Stock Companies Acts, 1856, 1857.[38]

By an Act of the same session[39] so much of the Joint-Stock Banking Companies Act, 1857, as prohibited a banking company from being formed under that Act with limited liability, was repealed; but where banks claimed to issue notes, they were to continue subject to unlimited liability in respect of them, and the shareholders were to be liable for the whole amount of the note issue in addition to the sum for which they would be liable as shareholders of a limited company.

And now we come to the Companies Act, 1862,[40] which in a much amended state is still the principal British Companies Act.

By its 205th section the Acts specified in the first part of the

[29] 19 & 20 Vict. c. 47, *supra.* [30] 20 & 21 Vict. c. 14, *supra.*
[31] Section 6. [32] Section 12. [33] Section 13.
[34] 19 & 20 Vict. c. 47, *supra.* [35] 20 & 21 Vict. c. 14, *supra.*
[36] *Supra.* [37] 21 & 22 Vict. c. 60. [38] Section 23.
[39] 21 & 22 Vict. c. 91. [40] 25 & 26 Vict. c. 89.

third schedule to the Act were repealed, but certain provisions of them, set out in the second part of the same schedule, were re-enacted. The repealed Acts were (among others) the 7 & 8 Vict. c. 110, already referred to,[41] the 7 & 8 Vict. c. 111, 8 & 9 Vict. c. 98, 11 & 12 Vict. c. 45, 12 & 13 Vict. c. 108, and 20 & 21 Vict. c. 78 (which were all winding-up Acts); the 7th & 8th Vict. c. 113 (as to joint-stock banks); the 10 & 11 Vict. c. 78 (as to joint-stock companies), the Joint-Stock Companies Acts of 1856[42] and 1857[43]; the Act of 1857 as to banking companies,[44] and the Act of the same session amending the Act of 1856,[45] and also the Act 21 & 22 Vict., chapters 60 and 91.

The re-enacted provisions were section 47 of 7 & 8 Vict. c. 113, as to banking companies of more than six persons within sixty-five miles of London, and not within 7 & 8 Vict. c. 113, suing and being sued, and as to enforcing judgment against them; and part of section 12 of 20 & 21 Vict. c. 49, declaring it lawful for any number of persons, not exceeding ten, to carry on banking in the same manner as six persons or more could previously have carried on the business of banking. The repeal was not to affect the incorporation of any company registered under a repealed Act, or Table B in the schedule to the Act of 1856 so far as it applied to any company existing at the time when the Act of 1862 came into force.[46] And every insurance company registered under 7 & 8 Vict. c. 110 was on or before November 2d, 1862, and every other company which was required by a repealed Act to register under the Joint-Stock Companies Acts, and which had not so registered, was obliged to register itself within a short period as a company under the Act of 1862.[47] Default in complying with these last provisions brought penalties on the directors and incapacitated the company from suing or paying dividends, but it did not make the company illegal.[48]

Part VI[49] of the Act of 1862 related to companies under "the Joint-Stock Companies Acts."[50] By its 176th section, subject as thereinafter mentioned, the new Act with the exception of Table

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[41] *Supra*, p. 461. [42] 19 & 20 Vict. c. 47, *supra*.

[43] 20 & 21 Vict. c. 14, *supra*. [44] 20 & 21 Vict. c. 49, *supra*.

[45] 20 & 21 Vict. c. 14. [46] Section 206. [47] Section 209.

[48] Section 210. [49] Sections 175-178.

[50] Viz., The Joint-Stock Companies Acts, 1856 & 1857; the Joint-Stock Banking Companies Act, 1857; and the Act enabling Joint-Stock Banking Companies to register with limited liability, but not the 7 & 8 Vict. c. 110.

A was to apply to companies formed and registered under the Joint-Stock Companies Acts if those companies had been formed and registered under the Act of 1862, and the power of altering articles under that Act was extended to altering Table B. By section 177 the new Act was also to apply in the same manner to companies registered but not formed under the Joint-Stock Companies Acts as if they had been registered under the Act of 1862. By section 178 any company registered under the Joint-Stock Companies Acts might cause its shares to be transferred in a manner already in use or in such manner as the company might direct.

Part VII[51] related to existing companies authorized to registered under the new Act. By section 179 no company having its liability limited by Act of Parliament, and not being a joint-stock company[52] could register under Part VII; nor could any company so limited register under Part VII as an unlimited company limited by guarantee; nor could a company which was not a joint-stock company register under Part VII as a company limited by shares. No company could register thereunder without the assent of a majority of its members. In case a company not having liability limited by Act of Parliament or letters patent registered as a limited company, a three-fourths majority was required, and there were other requirements when a company registered itself as a company limited by guarantee. By section 180, subject as above, every existing company registered under the Joint-Stock Companies Acts, consisting of seven or more members, and every company thereafter formed in pursuance of any Act of Parliament, "other than this Act," or of letters patent, or working mines in the Stannaries, or being otherwise duly constituted by law, and having seven or more members, was enabled to register itself under the Act as an unlimited company, a company limited by shares, or a company limited by guarantee. By section 182 banking companies claiming to issue notes in the United Kingdom were not to be entitled to limited liability in respect to such issue, the members being liable therefor in addition to their liability as members. Later sections pointed out how registration under Part VII was to be obtained, and by section 196, when such registration had been obtained, all provisions of any Act of Parliament, deed of settlement, or other instrument constituting or regulating the company were to take the place of

[51]Sections 179-198. [52]As defined in section 181.

a registered memorandum and articles, and the provisions of the Act of 1862 were to apply to the company as if it had been formed under the Act, subject to certain provisions—as that Table A of 1862 was not to apply unless adopted by special resolution; that shares need not be numbered, if not previously numbered; that the company could not alter any Act of Parliament relating to it, or without leave of the Board of Trade, any letters patent; that the company could not alter any provision of the instrument constituting it, which, if the company had been formed under the Act, would have been contained in its memorandum of association, and which would not have been alterable under the Act. But this was not to derogate from any power of alteration given by the instrument constituting the company.

The Act of 1862 gave no power to a company to reduce its capital, and old companies which possessed that power lost it by registering under the Act. Future associations of more than ten persons to carry on banking were prohibited, unless registered as a company under the Act, or formed under some other Act of Parliament, or letters patent; and there was a prohibition as to future associations of more than twenty persons to carry on any other business having for its object the acquisition of gain by the association or its members, unless it was registered as a company under the Act or was formed under some other Act of Parliament or was a mining company in the Stannaries.[53] As to new companies, the old number of seven or more original members signing a memorandum of association was required.[54] The liability of members might be limited either to the amount unpaid on the shares, or to the amount they guaranteed by the memorandum in the event of the company's being wound up. The contents of the memorandum of a guarantee company differed a little from that of a company limited by shares, and that of an unlimited company differed from both. The conditions of the memorandum might be altered by increasing the capital, consolidating and dividing the shares into shares of larger amount; or converting paid-up shares into stock, or changing the company's name, but otherwise no alteration could be made in the memorandum. A company limited by shares could either register with a memorandum articles of association signed by those who signed the memorandum, or it could register without articles, in which case Table A in the

[53]Section 4. [54]Section 6.

schedule formed its regulations, or it might adopt Table A. Guarantee and unlimited companies were required to have articles which might incorporate, but need not, all or any of Table A. The articles of these companies had to state certain particulars not required in the case of a company limited by shares.[55] Incorporation was evidenced by a certificate of the fact, and thereupon the signatories of the memorandum and other persons becoming members became a body corporate,

"capable of exercising all the functions of an incorporated company having perpetual succession, and a common seal, with power to hold lands."[56]

Companies formed for the purposes of art and the like, not involving the acquisition of gain, could not hold more than two acres without the license of the Board of Trade.

Part II related to the distribution of capital and the liability of members, section 38 pointing out the liabilities of present and past members respectively in the event of winding up. It was provided that any shares might be transferred in the manner stipulated by the articles, and that the articles might be silent on this point—in which case there would be an unrestricted right of transfer—or they might place any restrictions on the right.

Part III related to management and administration, including registration of mortgages and a limited right of inspecting the register, as to holding general meetings, altering regulations, and passing resolutions, notices, etc. The Board of Trade was also given power to alter Table A.

Part IV contained numerous provisions as to the winding-up of companies, continuing the then old methods of winding-up—by the court, voluntarily, and under the supervision of the court. Sections 161 and 162 related to sales of the company's property for shares in another company, and section 165 provided a summary method of dealing with officers guilty of misfeasance.

Part V related to the registration office; and the remaining parts have been already dealt with.

One speaks of the Act of 1862 in the past tense, but most of the Act is still in force, although extensively amended.

In 1864 an Act[57] was passed which enabled companies under the Act of 1862, and carrying on business in foreign countries, to have official seals to be used in such countries.

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[55]Section 14. [56]Section 18. [57]27 & 28 Vict. c. 19.

The Companies Act, 1867,[58] made some important alterations. Its fourth section provided that when a company was in future formed as a limited company under the Act of 1862, the liability of the directors or managers or managing director should be unlimited, if it was so provided by the memorandum of association; but the writer has never assisted in forming a company where any director has allowed such a provision to be inserted. Express notice is to be given of this liability to any person proposed to be appointed a director or manager. By section 8 an existing limited company might (if so authorized by its articles), by special resolution, add a similar provision to its memorandum.

A more important alteration made by the Act of 1867 was that which enabled a company limited by shares (if so authorized by its articles), for the time being to reduce its capital[59] if such reduction was confirmed by an order of the (then) Court of Chancery.[60] Another section enabled a company (so authorized by its articles for the time being) by special resolution, to subdivide its shares into shares of a smaller amount.[61] Then section 23 enabled certain companies not formed for gain but for some useful object like art or science, by license of the Board of Trade, to register with limited liability, but without the word "Limited" as part of its name, and without the power of paying any dividends to its members. Other provisions of this Act were[62] that a share in a company was to be deemed to have been issued on the terms of being paid up in cash unless it was otherwise determined by a contract in writing filed before issue with the Registrar of Joint-Stock Companies; and that[63] prospectuses inviting persons to subscribe for shares were to be deemed fraudulent unless certain particulars as to contracts were stated therein. These two sections until repealed caused much litigation and also some hardship. Other sections of the Act defined how a company's contracts were to be entered into, and provided for the issue of share warrants to bearer, etc.

The Joint-Stock Companies Arrangement Act, 1870,[64] enabled the Court of Chancery, when a company was in liquidation (whether voluntarily or otherwise) to call meetings of its creditors with a view to compromise or arrangement, or to sanction the arrangement provisionally arrived at.

[58] 30 & 31 Vict. c. 131. [59] Section 9. [60] Section 11.
[61] Section 21. [62] Section 25. [63] Section 38.
[64] 33 & 34 Vict. c. 104.

The Life Assurance Companies Acts of 1870,[65] 1871[66] and 1872[67] imposed many obligations on incorporated and unincorporated Life Assurance Companies, especially as to deposits of substantial sums on setting up business, and making returns concerning their doings. The Acts also related to the amalgamation and transfer of their businesses, reduction of contracts and a winding-up of these companies.

Before the next Act was passed the old Court of Chancery had ceased to exist and been merged in the High Court of Justice, one division of which was and is called the Chancery Division. A much-respected judge of this division in 1877 held that where a company had lost part of its paid-up capital the court had no jurisdiction to write off the loss by reducing the nominal amount of the shares—in other words, that only uncalled capital could be reduced.[68] This decision was wrong, but everybody did not think so, and in the same year, in consequence of it, there was passed the Companies Act, 1877,[69] which provided that "capital" in the Act of 1867 included paid-up capital, and that the power to reduce capital included the power to cancel any lost capital or capital unrepresented by available assets, or to pay off any capital in excess of the wants of the company. The confirmation of the court was required, but under less stringent conditions in these cases, and a power was given to cancel unissued shares without going to the court at all.

The Companies Act of 1879[70] enabled companies registered before or after the Act as unlimited to register under the Acts, 1862 to 1879, as limited companies, and enabled companies already registered as limited to re-register under the Act of 1879. If thereupon a company increased its capital by increasing the nominal amount of its shares, the increased capital was incapable of being called up except in the event of and for the purpose of the company's being wound up, and if there was no initial increase, part of the existing uncalled capital would be on the same footing. A limited company was also enabled by special resolution to make any part of its uncalled capital uncallable except on and for winding up. The same Act repealed section 182 of the Act of 1862[71] and made a fresh enactment as to the liability of members of

[65] 33 & 34 Vict. c. 61. [66] 34 & 35 Vict. c. 58. [67] 35 & 36 Vict. c. 41.
[68] *In re* Ebbw. Vale Steel, Iron, and Coal Co. (1877) L. R. Ch. D. 827.
[69] 40 & 41 Vict. c. 26. [70] 42 & 43 Vict. c. 76.
[71] 25 & 26 Vict. c. 89, *supra*.

banks of issue registered as limited companies. The Act also provided for the audit of accounts of limited banking companies. A company authorized to register under the Act of 1879 might do so notwithstanding anything in its own Act of Parliament or other instrument of constitution.

The Companies Act of 1880 (43 Vict. c. 19) allowed a company which had accumulated a sum of undivided profits, which might with the shareholders' assent be distributed as dividend, by special resolution, and without the court's sanction, to return the same or part thereof to the shareholders in reduction of the paid-up capital, the uncalled capital being correspondingly increased and being liable to be called up in future, but any shareholder might require the company to retain the money proposed to be paid to him in respect of his shares. The same Act empowered the Registrar of joint-stock companies to strike defunct companies off the register, but gave the court the power of resurrection on the petition of the dead company or of any member aggrieved.

The Companies (Colonial Registers) Act, 1883,[72] enabled companies with share capital, and registered under the Act of 1862, to keep local registers of their members in British Colonies.

The Preferential Payments in Bankruptcy Act, 1888,[73] gave priority in winding up to certain debts, *e. g.*, parochial rates, and wages, to a certain limit, of clerks, servants, laborers and workmen.

In 1890 three important Acts were passed. The Companies (Memorandum of Association) Act[74] enabled a company registered under the Acts, 1862 to 1886, to alter the objects of the company as stated in its memorandum of association or deed of settlement, or to substitute a memorandum and articles for a deed of settlement, but the alteration had to be confirmed by an order of the Court. The Companies (Winding-Up) Act[75] placed the winding-up jurisdiction in the hands of (*a*) judges of the High Court nominated from time to time by the Lord Chancellor, (*b*) the Palatine Courts, and (*c*) when the paid-up capital was small, certain County Courts in whose districts the company was domiciled. The winding-up of companies working mines within the Stannaries was left to the Stannaries Court. The same Act constituted officers called "Official Receivers." The Official Re-

[72] 46 & 47 Vict. c. 30. [73] 51 & 52 Vict. c. 62. [74] 53 & 54 Vict. c. 62.
[75] 53 & 54 Vict. c. 63.

ceiver becomes provisional liquidator from the time when the winding-up order is made until a liquidator is appointed, and he may be continued as permanent liquidator if no other person is selected. Apart from his duties as a liquidator, the Official Receiver has independent duties under the Act; thus he is an officer of the Court and also of the Board of Trade, which has large controlling powers under the Act. This Act also gives the Court power to order the public examination of officers of the company suspected of fraudulent dealing, and makes provision for the custody and application of funds coming to the hands of liquidators. The Directors Liability Act[76] makes directors and promoters liable for misstatements in prospectuses although they are not fraudulently made. It was passed in consequence of the decision of the House of Lords in *Derry* v. *Peek*.[77]

The title of the Stannaries Court (Abolition) Act, 1896,[78] tells what this Act did; under it the winding-up jurisdiction in respect of certain companies was transferred to a Cornish County Court.

The Preferential Payments in Bankruptcy Amendment Act, 1896,[79] extended the priority of the debts mentioned in the Act of 1888,[80] as against floating charges created by debentures and debenture stock.

The Companies Act, 1898,[81] enabled the Court to grant relief where contracts had not been filed under section 25 of the Act of 1867,[82] through inadvertence and the like.

The Bodies Corporate (Joint Tenancy) Act, 1899,[83] enables a body corporate to hold any property jointly with an individual or another body corporate or both.

The Companies Act, 1900,[84] differentiates between what were then known as "private companies"—namely, those which do not invite the public to subscribe for its shares—and public companies, which do issue such invitations. As regards the latter, stringent restrictions were imposed which were not imposed on the private companies, *e. g.*, as regards the appointment of directors, the allotment of shares, the commencement of business, and the filing and contents of prospectuses, whether in respect of shares,

[76] 53 & 54 Vict. c. 64. [77] (1889) L. R. 14 App. Cas. 337.
[78] 59 & 60 Vict. c. 45. [79] 60 & 61 Vict. c. 19.
[80] 51 & 52 Vict. c. 62, *supra*. [81] 61 & 62 Vict. c. 26.
[82] 30 & 31 Vict. c. 131, *supra*. [83] 62 & 63 Vict. c. 20.
[84] 63 & 64 Vict. c. 48.

debentures, or debenture stock. But many of its provisions apply to both classes of companies, *e. g.*, as to the qualification of directors, the new early statutory meeting, the registration of floating securities, securities of any issue of debentures, and charges on uncalled capital, compulsory audit, and the reconversion of stocks into shares. The Act countenances under certain conditions the underwriting of shares of companies going to the public, and repeals sections 25 and 38 of the Act of 1867.[85] Although a contract to take shares for a consideration other than cash requires registration, the omission to register does not make the shareholder liable to pay up anything on the shares. Certain particulars of contracts and a vast deal more information has to be stated in prospectuses. The language of the Act, which was rushed through Parliament, is in many parts most obscure.

In 1906 the Board of Trade, under a power in the Act of 1862 (25 & 26 Vict. c. 60),[86] issued a new Table A for future use instead of the out-of-date Table A used for forty-four years previously.

The Companies Act, 1907,[87] is, if possible, more incomprehensible than its immediate predecessor. The only provisions of it yet in force are those which declare the validity of perpetual debentures, and provide that the redemption of one or more debentures of a *pari passu* series shall not necessarily operate so as to let the other debentures of the series close in and prevent the valid reissue of the redeemed debentures, so as to have equal rank. The rest of the Act does not come into operation until July 1st, 1908, and then there will be great changes. To the old so-called private companies, or some of them, restrictions and requirements will apply which formerly did not extend to them; for instance, the filing, before allotment of shares or debentures, of a document containing many of the particulars now required to be stated in a public company's prospectus. The Act requires companies of both classes to include in the annual filed summary a statement in the form of an audited balance-sheet, containing a summary of its capital, liability, and assets. A "private company," as defined by the Act, is exempted from these requirements. The new creature called a "private company" is one which by its articles

(*a*) "restricts the rights to transfer its shares,"

(*b*) "limits the number of its members (exclusive of persons who are in the employment of the company) to fifty."

[85] 30 & 31 Vict. c. 131, *supra*. [86] *Supra*. [87] 7 Ed. VII. c. 50.

(*c*) "prohibits any invitation to the public to subscribe for any shares or debentures of the company."

But two or more persons holding one or more shares jointly are to be treated as a "single member." Moreover, whenever in the Acts a minimum of seven persons is required, only two members are required in a case of a private company; that is to say, (*inter alia*) two or more persons may form themselves into a private company, and the dwindling of members will not be a ground for winding-up unless the number is reduced below two.

The Act of 1907 makes numerous amendments in former Acts. The provisions of the 1900 Act[88] as to the contents of a prospectus are altered without being made much clearer. Some underwriting is allowed even where the company does not issue a prospectus. Under certain restrictions payment of interest out of capital during the construction of works is allowed. The provisions of 1900 as to registering charges are slightly altered: registration is required of the appointment of a receiver and manager, and of the total amount of secured debts created before July 1st, 1908. Floating charges, not for cash, made shortly before winding-up are invalidated. A company may enforce by specific performance a contract to take its debentures. Greater powers of inspection of registers are given. The auditing clauses of the Act of 1900 are altered. Amendments are made in the law as to meetings of shareholders. Important changes are made as to winding-up: for instance, in a voluntary winding-up the liquidator has to call a meeting of creditors, to whose wishes the court may give effect, and a winding-up petition may be presented by a "contingent or prospective creditor." Restrictions are also placed on the dissolution of companies in liquidation. Moreover, companies incorporated outside, but carrying on business within the United Kingdom, are required to file with the Registrar of Joint-Stock Companies (*inter alia*) certified copies of their instrument of constitution, lists of their directors, and the name and address of some person within the jurisdiction on whom process may be served. There is also a clause enabling a company to modify the conditions of its memorandum so as to reorganize its capital, but confirmation by the Court is required; and any person or persons who trade under a name of which the last word is "Limited," and who are not incorporated with limited liability, are liable to penalties.

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[88] 63 & 64 Vict. c. 48, *supra*.

It is doubtful whether these provisions will ever come into force, for all the Acts from 1862 to 1907 are shortly to be consolidated into one great Company Statute, which may be passed in time to operate on July 1st, 1908.[89]

In the meanwhile companies are turning themselves into what will be "private companies" under one Act or another on that date, and the company draftsman is flourishing.

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[89]The Bill was read for the first time in the House of Lords on April 1st, 1908.

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JUNE, NINETEEN HUNDRED AND EIGHT.

NOTES.

ADMISSIONS OF A PARTNER AFTER FIRM DISSOLUTION.—It is uniformly held that the admissions of a partner concerning partnership affairs and in the ordinary course of business, are receivable in evidence against the firm, if made during its continuance, *Randall* v. *Knevals* (1898) 27 App. Div. 146; aff'd (1900) 161 N. Y. 632; *Western Assurance Co.* v. *Towle* (1886) 65 Wis. 247, upon the theory either that partners are mutual agents, Wigmore, Evid. § 1078; Bates, Partn. § 333; *Webster* v. *Stearns* (1863) 44 N. H. 498, or parties in joint-interest. *Munson* v. *Wickwire* (1852) 21 Conn. 513; *Catt* v. *Howard* (1820) 3 Starkie 3. But the rule as to admissions made after dissolution is much controverted. Parsons, Partn. (4th Ed.) 161, n.; Wigmore, *supra*, § 1280, n. 7. The conflicting authorities are usually grouped under two opposed cases: see Burdick, Partn. (2nd Ed.) 247; Bates, *supra*, 699:—*Wood* v. *Braddick* (1808) 1 Taunt. 104, declaring competent as against A, partner B's admissions after dissolution, concerning an engagement entered before dissolution; *Hackley* v. *Patrick* (N. Y. 1808) 3 Johns. 536, in broad terms holding them incompetent. The latter view may fairly be termed the "New York rule" because of its origin and reiteration in that state. *Baker* v. *Stackpole* (1827) 9 Cow 420:

Hart v. *Woodruff* (1881) 24 Hun 510; *Pringle* v. *Leverich* (1884) 97 N. Y. 181; *Mackintosh* v. *Kimball* (1905) 101 App. Div. 494.

Curiously, each group considers only one aspect of the partners' dual relation. The *Wood* v. *Braddick* group, *supra,* bases its rule upon joint-interest, regarding as unaffected by dissolution the partners' original joint-interest in the previously created rights and obligations. *Parker* v. *Merrill* (Me. 1829) 6 Greenl. 41, 43; *Bispham* v. *Patterson* (1840) 2 McClean 87, 89. But since, under any joint-relation, admissions of B cannot charge A, unless their joint-interest has already been established, *Alcott* v. *Strong* (1852) 9 Cush. 323; Greenleaf, Evid. (16th Ed.) § 177, the rule of *Wood* v. *Braddick* should apply only where the subject of the admission has first been *aliunde* proved a partnership affair. *Cady* v. *Shepherd* (1831) 11 Pick. 400; *Pennoyer* v. *David* (1860) 8 Mich. 407. On this ground the result in *Hackley* v. *Patrick, supra,* might be justified. The force of the restriction becomes most apparent in actions where A pleads that the firm obligation alleged was really the individual contract of B, who made the admission. Cf. *Willis* v. *Hill* (N. C. 1837) 2 Dev. & B. L. 231. This limitation does not conflict with the other rule that B's declarations before dissolution at the time of procuring a loan, actually for himself, are competent to show that credit was given to the firm, *Smith* v. *Collins* (1874) 115 Mass. 388; *Tremper* v. *Conklin* (1870) 44 N. Y. 58; for borrowing money lies within the scope of a trading firm during its continuance, Burdick, *supra,* 188, and such statements must be regarded as inducement to a contract within the apparent authority of the declarant. *Benninger* v. *Hess* (1884) 41 Oh. St. 64; cf. *Union Nat'l Bank* v. *Underhill* (1886) 102 N. Y. 336. Similar declarations subsequent to the transaction would not charge the firm. *White* v. *Gibson* (N. C. 1850) 11 Ired. L. 283; *Klock* v. *Beekman* (1879) 18 Hun 502 (dissenting opinion). A second restriction on the rule in *Wood* v. *Braddick, supra,* is that the admission must be made in the course of the winding-up; otherwise the scope of admissibility would be wider than under the accepted rule as to admissions made before dissolution. *Supra; Boor* v. *Lowrey* (1885) 103 Ind. 468. This limitation seems logically inconsistent with the usual statement of the doctrine concerning admissions of parties in joint-interest, *Walling* v. *Rosevelt* (1837) 16 N. J. L. 41; *Bank of U. S.* v. *Lyman* (1848) 20 Vt. 666, 671; Wigmore, *supra,* § 1077, but is reasonable and has been recognized in the present British Partnership Act (1890) § 15, which purports merely to declare *Wood* v. *Braddick.* Lindley, Partn. (7th Ed.) 842, 148.

In New York, admissions of one party in joint-interest are receivable against another only when there exists mutual authority, express or implied. *Wallis* v. *Randall* (1880) 81 N. Y. 164. But even from the standpoint of agency—the sole aspect considered in the second group, *supra*—the New York rule, *supra,* it is submitted, is too broad. It wrongly assumes the agency of the partners totally ended by dissolution. Abundant authority is not wanting, even in New York, that no complete revocation occurs. *Gates* v. *Beecher* (1875) 60 N. Y. 518, 524. Disregarding situations peculiar to dissolution caused otherwise than by agreement,—though, broadly speaking, partners may after dissolution no longer bind the firm by new con-

tracts, rights and obligations previously created persist. Thus, in the absence of contrary agreement, every member retains implied power to execute outstanding engagements, *Western Stage Co.* v. *Walker* (1856) 2 Ia. 504, to adjust claims against the firm, *Tutt* v. *Cloney* (1876) 62 Mo. 116, and to collect and receipt for money due. *Gillilan* v. *Ins. Co.* (1869) 41 N. Y. 376. So far are the partners from becoming mere strangers, that a demand on one member of a dissolved firm of makers suffices to charge the indorser of a note. *Gates* v. *Beecher, supra.* Even, therefore, if partners be considered without power to bind each other unless as agents, the true rule, it is submitted, requires that such admissions, made after dissolution, be received against the firm as amount to words and acts fairly within the scope of the authority retained, and in the ordinary course of the winding-up. See Burdick, *supra,* 248; Parsons, *supra,* § 128. Since the partners' agency after dissolution is confined to operations normally essential to final settlement, *Hall* v. *Lanning* (1875) 91 U. S. 160, the scope of admissibility under this rule would of course be narrow. Thus, there would still be excluded as against the partner not making the admission:—a deposition that a contract sued on by the firm had been satisfactorily performed, *Iron Co.* v. *Cohen* (1903) 113 Ill. App. 30; admissions converting an account current into an account stated, *Hart* v. *Woodruff, supra,* since stating an account gives a new cause of action, (see Bates, *supra,* 737, justly criticising *Buxton* v. *Edwards* (1883) 134 Mass. 567); loose declarations, years after dissolution, that certain goods had been delivered to the firm, *Chardon* v. *Oliphant* (S. C. 1813) 3 Brev. 183; and acknowledgments of firm debts barred by the statute of limitations, since under the modern view of that statute, see *Van Keuren* v. *Parmalee* (1849) 2 N. Y. 523, the promise of payment implied, though based on the old consideration, is a new contract. *Wilson* v. *Torbert* (Ala. 1831) 3 Stew. 296. Nevertheless, the rule would at least cover, for example, an acknowledgment of debt while engaged in adjusting the unsettled business, *Feigley* v. *Whitaker* (1872) 22 Oh. St. 606, and declarations contemporaneous with receiving payment of a firm credit. *Kirk* v. *Hiatt* (1850) 2 Ind. 322 (*semble*).

Tested by the foregoing principles, a recent West Virginia decision seems questionable. *Burdett* v. *Greer* (W. Va. 1908) 60 S. E. 497. In an action against A and B, partners, (later abated as to A) for work performed under a contract *aliunde* proved to have been formed before dissolution, A's acknowledgment of the amount due, made during a settlement after dissolution, was held inadmissible. The court reasoned from the well-settled law that a partner may not after dissolution deliver a firm note, *Abel* v. *Sutton* (1808) 3 Esp. 108; *Gale* v. *Miller* (1874) 54 N. Y. 536, or even renew old paper, *Nat'l Bank* v. *Norton* (1841) 1 Hill 572; *Hurst* v. *Hill* (1855) 8 Md. 399. But the basis of this doctrine is not, as assumed, that such acts make new evidence, see *Parker* v. *Merrill, supra,* but that they create new contracts. Burdick, *supra,* 245. That the sum due in the principal case was wholly for work done since the dissolution seems immaterial; for the Court conceded that the entire contract survived.

The validity of the suggested modification of the New York rule seems

to have been recognized even in a relatively late dictum of the New York Court of Appeals, *Nichols* v. *White* (1881) 85 N. Y. 531, 536, and it has been embodied in the proposed American Partnership Act, Reports of Amer. Bar Ass'n, (1906), Pt. II, 440, §§ 14, 38, though the existing rule is probably sanctioned by the weight of American authority. 22 Am. & Eng. Encyc. L. (2nd Ed.) 217. The argument that any rule other than broad exclusion is dangerous because ill-feeling often follows partnership dissolution, cf. *Gleason* v. *Clark* (1828) 9 Cow. 57, 59, should go to the weight and not to the competence of such admissions. Cf. *Western Assurance Co.* v. *Towle, supra,* 256; *King* v. *Hardwick* (1809) 11 East 578, 586. The present New York rule may be of easier application; but the consequent reduction of opportunity for reversible trial error hardly justifies divergence from principle.

Equitable Jurisdiction of Mutual Error of Law.—Courts are in substantial accord upon two aspects of this subject. First, mutual mistake of foreign law is relievable. Such error, while almost universally regarded as pure error of fact, Kerr, Fraud and Mistake (2nd Ed.) 466; *Imperial etc. of Trieste* v. *Funder* (1872) 21 Week. R. 116, is as genuine mistake of law as mistake of the *lex fori.* The true basis—that the ignorance concerns that which the individual is excusable for failure to know—has apparently been overlooked. Second, in compromises the existence of mistake, properly so-called, is manifestly impossible. Both parties have done just as intended, namely, to assume the contingency of gaining or losing by the arrangement according as the law should prove. *Hall* v. *Wheeler* (1887) 37 Minn. 522. Family settlements, in so far as they involve this element, proceed upon the same principle. *Burnes* v. *Burnes* (1904) 132 Fed. 485. It has been suggested, without attempt at definition of the language employed, that when both parties to the compromise mistake a "plain and settled principle of law" relief should be granted. Sir John Leach in *Naylor* v. *Winch* (1824) 1 Sim. & Stu. 555, 564. This distinction, it is submitted, is not only unsupported by authority, cf. *Faust's Adm'x* v. *Birner* (1860) 30 Mo. 414, but logically unsound, for the error is less excusable and *pari passu* more reprehensible than where a dubious and disputed rule is in question. Cf. *Good* v. *Herr* (Pa. 1844) 7 Watts & S. 253. The substantial recognition of these principles, unsettled as they still are in some respects, is in striking contrast with the numerous conflicting views of the proper jurisdictional test for error of law in general.

Where the written instrument, from error as to the legal effect of the language used, fails to express the intention of the parties, for example, where a scrivener misuses technical terminology, *Hunt* v. *Rousmanier* (1823) 8 Wheat. 174; (1828) 1 Pet. 1, or errs in the legal force of a description, *Pitcher* v. *Hennessey* (1872) 48 N. Y. 415, and the parties accept the document under the belief that it sets forth their bargain, the weight of judicial authority and the majority of text writers, Pomeroy, Eq. Jur., §§ 843, 845; Story, Eq. Jur., § 114, insists that "equity will grant relief * * * and it matters not whether such mistake be called one of law or fact." Beach, Mod. Eq. Jur., 540; cf. *Canedy* v. *Marcy* (Mass. 1859) 13 Gray 373.

In a recent Massachusetts case of this character the mistake was regarded as "pure error of fact." *Eustis Mfg. Co.* v. *Saco Brick Co.* (Mass. 1908) 84 N. E. 449. If the mistake be one of fact, reformation may, of course, as in all bilateral error of fact, be granted. But, whether the legal force of the words employed be mistaken by the parties themselves or by their agent, the mistake seems clearly error of law as to the nature of the agreement adopted. *Fowler* v. *Black* (1891) 136 Ill. 363. The distinction between such cases and cases in which the parties mistake the legal effect of an instrument—which practically all authorities, *Eldridge* v. *Dexter etc. R. R. Co.* (1895) 88 Me. 191; *Dupre* v. *Thompson* (1848) 4 Barb. 279; *Proctor* v. *Thrall* (1850) 22 Vt. 262, including the authors above cited, Pomeroy, Eq. Jur. § 843; Story, Eq. Jur. §§ 112, 113, join in declaring unrelievable—is trifling, if indeed, discoverable at all, from any logical standpoint. The parties agree upon the writing as stating their contract in the one instance as fully as in the other. 5 COLUMBIA LAW REVIEW 376. The significance of the desire to find the non-existent element of error of fact and thereby explain the relief granted in this class of cases is very manifest.

A recent Virginia case, *Burton* v. *Haden* (1908) 60 S. E. 736, in effect overruling an earlier decision, *Zollman* v. *Moore* (Va. 1871) 21 Gratt. 313, illustrates the tendency to regard error of antecedent and existing private rights—whether mutual or unilateral—as relievable, in contradistinction to error of law with respect to the legal effect of an instrument. Pomeroy, Eq. Jur. § 849. On the ground that both parties were laboring under the erroneous impression that the grantor was entitled under a deed to a lesser estate than the deed actually conveyed, Chancery set aside a conveyance of the "entire interest." The court regarded the error "as analogous to, if not identical with, a mistake of fact." That the mistake logically, under the authorities, and from the standpoint of the Civil Law, whence the maxim *Ignorantia juris non excusat* was derived, is mistake of law and logically indistinguishable from error as to the legal effect of an instrument, concededly unrelievable, *supra*, was indicated in 8 COLUMBIA LAW REVIEW 211, in a discussion of unilateral error. However erroneous and unsound it may be to regard the mistake as one of fact, that position is nevertheless at least intelligible, when compared with the view which regards the mistake as partaking of both and yet *in toto* of neither, *Goff* v. *Gott* (Tenn. 1858) 5 Sneed 562; *Gerdine* v. *Menage* (1889) 41 Minn. 417, and which not only unnecessarily creates a veritable *terram incognitam*, but fails to note that in every statement or misstatement of law, a fact—the condition of the law—is necessarily stated. See *Purvines* v. *Harrison* (1894) 151 Ill. 219.

In a note to Story, Eq. Jur. (13th Ed.) 115 et seq., Prof. Bigelow suggests that where the parties have deliberated on the law and then have chosen a course of action, equity should never relieve; *vice versa,* if there was unconscious ignorance of the existence of any question of law. Mr. Woodward, in 5 COLUMBIA LAW REVIEW 377 et seq., modifies this by submitting "the test of choice, with or without deliberation." Apart from any question of the premium seemingly placed upon ignorance as distinguished from intelligent activity, not only does the enforcement of either proposed rule present serious practical difficulty, but the authorities fail even to inti-

mate its existence, or to extend judicial favor to it, even where the subject is *res nova*. While its sponsors express "no doubt that a large number of cases may be brought into line with it," this contention is gravely open to doubt. In New York, for example, the test fails completely. *Maher* v. *Hibernia Ins. Co.* (1876) 67 N. Y. 283; *Marsh* v. *McNair* (N. Y, 1888) 48 Hun 117; *Dupre* v. *Thompson, supra.* See also *Ottenheimer* v. *Cook* (Tenn. 1872) 10 Heisk. 309; *Stedwell* v. *Anderson* (1851) 21 Conn. 139; *Easter* v. *Severin* (1881) 78 Ind. 540; *Eldridge* v. *R. R. Co., supra.*

While in numerous cases other and possibly controlling equities are present, *Pittsburgh etc. Co.* v. *Lake etc. Co.* (1898) 118 Mich. 109, 128, it must be conceded that in numerous cases, Chancery has granted relief on one theory or another. The weight of authority to-day, however, is still in accordance with the rule *Ignorantia juris non excusat*, which, a high authority notwithstanding, Scott, Cases on Quasi-Contracts, 406, Note 1, has been recognized from the earliest periods of equity jurisdiction. Doctor and Student, Dial. 1, ch. 26; Dial. 2, ch. 46; *Irnham* v. *Child* (1781) 1 Bro. Ch. 92. The unsound basis of the maxim in principle as applied to civil cases, its contrariety to Continental thought, 7 COLUMBIA LAW REVIEW 476, and the lack of reason, from the standpoint of natural justice, for allowing relief for mutual ignorance of fact, yet denying it for mutual ignorance of law, explain the illogical and increasing exceptions, of which the two principal cases are characteristic. It is submitted that the true remedy for the unfortunate situation can be found only in legislative action, and the newer and more progressive jurisdictions, alive at once to the strength of *stare decisis* in modern equity, 5 COLUMBIA LAW REVIEW 25, and to the necessity for relief, have not been slow to adopt this solution. N. Dak. Civ. Code § 3854; Cal. Civ. Code § 1578; S. Dak. Civ. Code § 1207; Oklahoma Revised Statutes, Ch. 15, § 20.

LAWFUL POSSESSION BY MORTGAGEE AFTER DEFAULT IN NEW YORK.—Prior to the statute of 1830, which deprived the mortgagee of the right to bring ejectment, the mortgagee's position at law had already become anomalous. *Runyan* v. *Mersereau* (N. Y. 1814) 11 Johns. 534; *Jackson* v. *Crafts* (N. Y. 1820) 18 Johns. 110; *Jackson* v. *Bronson* (N. Y. 1822) 19 Johns. 325. It was, however, asserted or assumed that the mortgagee had a legal estate after default, *Jones* v. *Clark* (N. Y. 1822) 20 Johns. 51; *Jackson* v. *Bowen* (N. Y. 1827) 7 Cow. 13; *Jackson* v. *Minkler* (N. Y. 1813) 10 Johns. 480, and lawful possession might be acquired without the mortgagor's consent in the absence of force, e. g., a mortgagor's tenant after default might attorn to the mortgagee. *Jones* v. *Clark, supra.* No substantial change immediately followed the statute. On the theory that its sole purpose was to save costs to the mortgagor by removing one of the mortgagee's concurrent remedies, the mortgagee's legal estate after default was held to be undiminished thereby. *Phyfe* v. *Reilly* (N. Y. 1836) 15 Wend. 248. Possession unfairly acquired seems early to have been regarded lawful. *Goldsmith* v. *Osborne* (N. Y. 1833) 1 Edw. Ch. 560. In *Van Duyne* v. *Thayre* (N. Y. 1835) 14 Wend. 233, the court mentioned two modes of acquiring lawful possession, consent of the mortgagor or legal proceedings. This decision, standing alone,

would seem to limit the methods previously available, but, taken in connection with *Phyfe* v. *Reilly, supra,* apparently produced no modification. In the latter case the court seems designedly to have used the non-committal expression that possession might be acquired in any legal mode other than action, in place of the more explicit term, legal proceedings. Moreover, contemporaneous cases assumed that the position of the mortgagee as such made methods legal in him which would be illegal in a stranger. For example, in *Fox* v. *Lipe* (N. Y. 1840) 24 Wend. 164, it was considered immaterial whether a sale on foreclosure was good or void, since ejectment would not lie against a mortgagee in possession, although entry upon at least a part of the mortgaged premises seems to have been effected without the mortgagor's consent. In *Winslow* v. *McCall* (N. Y. 1860) 32 Barb. 241, A, the owner of the mortgaged premises, was in possession through his tenant when the senior mortgage was foreclosed without notice to the junior mortgagee. A, subsequently purchased the overdue junior mortgage, and, as mortgagee, his possession through his tenant was held lawful. In reality A, though holding through his tenant, would seem to be in no better position than a tenant at will of the purchaser on foreclosure, and hence unable lawfully to change the character of his possession without the consent of the mortgagor unless the overdue mortgage gave him that privilege. So far as cases dealing directly with ejectment of mortgagees are concerned, Judge Denio's dictum in *Pell* v. *Ulmer* (1858) 18 N. Y. 139, 142, "if the mortgagee obtains possession without force (or fraud?) he is entitled as well since as before the statute to retain possession against the mortgagor," seems to be justified, cf. *Mickles* v. *Dillaye* (1858) 17 N. Y. 80; *Bolton* v. *Brewster* (N. Y. 1860) 32 Barb. 389, 395; *Chase* v. *Peck* (1860) 21 N. Y. 581, 586, and for years, judges continued to repeat loosely that ejectment does not lie against a mortgagee in possession. *Winslow* v. *Clark* (1872) 47 N. Y. 261; *Hubbell* v. *Sibley* (1872) 50 N. Y. 468, 472; *Hubbell* v. *Moulson* (1873) 53 N. Y. 225, 227.

Meantime, cases on collateral questions, involving a consideration of the nature of mortgagor's and mortgagee's interests, rejected Judge Denio's view that the mortgagee has a legal estate after default. Cf. *Packer* v. *Rochester etc. Co.* (1858) 17 N. Y. 283, 287, 295; *Trimm* v. *Marsh* (1874) 54 N. Y. 599. From these decisions, it follows logically that, since the mortgagee is at law a stranger, the acquisition of possession without the mortgagor's consent is unlawful. *Madison Ave. Bapt. Church* v. *Oliver Bapt. Church* (1878) 73 N. Y. 82; *Howell* v. *Leavitt* (1884) 95 N. Y. 617. In *Howell* v. *Leavitt, supra,* the mortgagees, who purchased on foreclosure sale, void as against the mortgagor's infant heirs, evicted the latter's tenant by a writ of assistance. The heirs recovered in ejectment. This case might be supported merely on the ground of entry by force, but it undoubtedly stands for the broader proposition that entry must be with consent. *Townsend* v. *Thompson* (1893) 139 N. Y. 152, apparently adopts the theory that peaceable entry under color of a non-existing right, i. e., under a sale void as against the assignee in bankruptcy of the mortgagor, is lawful. This theory, however, is hardly consistent with the holding in *Howell* v. *Leavitt, supra,* where, also under color of non-existing right,

entry by writ of assistance was unlawful. The real ground of the decision seems to have been the subsequent acquiescence of the assignee. Under what circumstances a mortgagee may acquire lawful possession by inducing the mortgagor's tenant to attorn is still in doubt. It is provided in 1 R. S., Ch. 744, § 3, Laws of 1896, Ch. 547, § 194, that attornment after forfeiture shall not be void. A literal construction would lead to the anomalous result that, if by chance there be a tenant in possession, a mortgagee may acquire lawful possession without consent, whereas under any other circumstances consent is essential. The courts may, in view of the change in the nature of the mortgagee's estate since the original enactment of the statute, construe "after forfeiture" to mean "after foreclosure," or in any event require the mortgagor's consent.

Logically, also, a mortgagee in possession in one character may not without the mortgagor's consent assert possession as mortgagee. The first case arising after the triumph of the mortgagor's estate in *Trimm* v. *Marsh, supra,* was, however, a hard case where the equities were all with the mortgagee who had entered under a void contract of purchase. The court, refusing to eject the mortgagee, asserted that the mortgagee's possession was lawful though not given under the mortgage or with a view thereto. *Madison Ave. Bapt. Church* v. *Oliver Bapt. Church, supra.* A recent case, *Barson* v. *Mulligan* (N. Y. 1908) 84 N. E. 75, carefully limits the application of this decision. It was held that the lessee of a tenant for life was not entitled to retain possession by virtue of an overdue mortgage purchased before, or shortly after, the death of her lessor. The court affirmed *Howell* v. *Leavitt, supra,* and laid down the rule that a mortgagee in possession as tenant, may not change the character of his possession to that of mortgagee without the mortgagor's consent. Express repudiation of *Winslow* v. *McCall, supra,* was avoided by treating the conclusion of law, i. e., the legality of the possession, as a finding of fact. The distinction between the principal case and *Madison Ave. Bapt. Church* v. *Oliver Bapt. Church, supra,* is narrow and seems to consist merely in that one in possession under a void deed occupies an ambiguous, ill-defined position, not regarded as inconsistent with possession under the mortgage, whereas the relation of tenant and landlord is well settled in character, and possession under the mortgage is clearly inconsistent therewith. Whether *Madison Ave. Bapt. Church* v. *Oliver Bapt. Church, supra,* will be restricted to its facts, is uncertain, but desirable; for a mortgagee is sufficiently protected in equity. The decision in the principal case is a real step in advance in that it defines more accurately the right of a mortgagee to retain possession once lawfully acquired. If he enter as tenant, express trustee, or, perhaps, as vendee under a contract of sale, the mortgagor's consent is essential.

THE RELATION OF BROKER AND CUSTOMER IN MARGIN TRANSACTIONS.—Agitation concerning transactions on margin makes a recent decision of the Supreme Court especially timely. Securities were bought for a speculator on "margin," under an agreement permitting the broker to pledge the securities carried in his general loans. Within four months of proceedings in bankruptcy against the broker, the securities were redeemed

by the broker and delivered to the customer, on receipt of the balance of account. The trustee in bankruptcy sued the customer, alleging a preference. A verdict was directed for the defendant on the ground that, since no relationship of debtor and creditor existed, the transfer was not preferential. *Richardson* v. *Shaw* (U. S. 1908) 28 Sup. Ct. Rep. 512. Following a leading New York case, *Markham* v. *Jaudon* (1869) 41 N. Y. 235, most jurisdictions regard stocks purchased on "margin" as the customer's property *ab initio*. *Baker* v. *Drake* (1876) 66 N. Y. 518; *Brewster* v. *Van Liew* (1886) 119 Ill. 554. The broker, according to their analysis, is the customer's agent in making the purchase; becomes his creditor for the amount advanced; is a pledgee of the stock to secure repayment of advances; is bound to have in his name or under his control, ready for delivery, the identical or similar shares; finally, upon receipt of all advances and commissions accruing, must comply with the customer's demand for delivery or for sale on account. The client must keep good a stipulated "margin," and stand prepared to take over the stock at the purchase price when required.

Upon analysis, the logical and practical difficulties of this position, strongly insisted upon by the Massachusetts courts, *infra,* and their adherents, 15 Harv. L. R. 78, are not serious. First, omission of delivery and redelivery is immaterial. The law seeks substance, not form. *Skiff* v. *Stoddard* (1893) 63 Conn. 198, 217. Moreover, it is well recognized that where a pledgee has the *res* already in his possession, the contract of pledge *per se* operates as a delivery. Story, Bailments (9th Ed.) 266. Second, as early as Kent's day, *Nourse* v. *Prime* (1820) 4 Johns. Ch. 490, it was decided in the case of a simple pledge that, provided the broker holds sufficient shares of similar stock, the identical shares of each customer need not be kept separate or even retained. The Massachusetts Supreme Court, on the other hand, speaking through Holmes, C. J., regards the "extreme tenuity of connection with any specific object" as an insurmountable obstacle to the existence of a pledge. *Chase* v. *City of Boston* (1902) 180 Mass. 458. Yet, in the well-known "Grain Elevator" cases, the confusion of the depositor's grain with other grain of like quality is regarded as perfectly compatible with a contract of bailment. Cf. *Chase* v. *Washburn* (1853) 1 Oh. St. 244. The case of *Levy* v. *Loeb* (1881) 85 N. Y. 365, far from conflicting, harmonizes perfectly, with the New York theory, for the contract specifically provided that the identical original securities be carried. The court expressly recognized that ordinarily a return of similar stock is adequate, provided—and this is fundamental—the broker at all times keeps under his control sufficient to satisfy the claims of his customers; the mere possession of ample funds with which to make good a stock shortage is insufficient. *Douglas* v. *Carpenter* (1897) 17 App. Div. 329. Third, the custom of brokers to rehypothecate stock carried is not a real inconsistency. There is ordinarily no implication that a pledgee shall retain the pledge in his exclusive possession. Jones, Pledges (2nd Ed.) 452. Doubtless in exceptional instances, e. g., an artistic masterpiece, such obligation of personal care may arise, but this element is absent in the case of stock certificates. A limitation is that the

repledge shall not be for an amount exceeding the indebtedness of the customer to the broker, since such disposition would operate to deprive the customer of immediate possession upon tender of the sum of his indebtedness. *Douglas* v. *Carpenter, supra.* Fourth, it is insisted that as stocks are a fluctuating property, the burden should not be upon the broker to call for more "margin," and to give reasonable notice of the time and place of sale. In most jurisdictions, however, and certainly on principle, evidence of a trade custom to sell without notice on exhaustion of "margin" is admissible. 6 COLUMBIA LAW REVIEW 365. Even in New York, where it is inadmissible, *Markham* v. *Jaudon, supra,* the broker may protect himself by special agreement with his customer. Dos Passos, Stock-Brokers, 114; *Baker* v. *Drake, supra.*

In contrast with this theory, the Massachusetts courts regard the broker as the owner of the shares upon a conditional executory contract to deliver them to the customer on demand and proper tender. *Wood* v. *Hayes* (1860) 15 Gray 375; *Covell* v. *Loud* (1883) 135 Mass. 41; *Weston* v. *Jordan* (1897) 168 Mass. 401. A like view of the similar "contango" transaction appears to have been taken in England by a lower court. *Bentinck* v. *London etc. Bank* [1893] 2 Ch. 120, esp. 140. Apart from the fact that if this construction were adopted it would become very questionable whether all "margin" transactions could not be set aside as mere wagers, Dos Passos, Stock-Brokers, 115, it is submitted that only by a perverted construction of the understanding of the parties, can the broker be regarded as the owner of the stock. The risk of the venture is the customer's solely. The dividends accruing are his. He pays interest upon the broker's advances. Any enhancement in value belongs to him. The broker is interested only to the extent of his commission. From every logical standpoint, therefore, the rejection of the Massachusetts view by the Supreme Court appears fortunate.

CONDITIONAL LIMITATIONS AFTER FAILURE OF PRIOR GIFT.—If a gift over be limited upon the performance of a condition, the gift cannot take effect unless the condition has been performed, though the first devisee die in the testator's lifetime. *Doo* v. *Brabant* (1792) 4 T. R. 706. Thus, if there be a devise to A, and if he die under twenty-one to B, and A die over twenty-one in the lifetime of the testator, there is a lapse. *Carpenter* v. *Heard* (1833) 14 Pick. 449. Since the ulterior disposition in such a case could not vest if the first devisee survived the testator, clearly it could not, if he predeceased him. *Savage* v. *Burnham* (1858) 17 N. Y. 561. On the other hand, if the condition has been performed, though in the testator's lifetime, the gift over takes effect. *Willing* v. *Baine* (1731) 3 P. W. 113. Difficulties in the application of these rules arose in a series of cases beginning with *Jones* v. *Westcombe* (1711) Pre. Ch. 316. In that case there was a bequest to a child with whom the testator's wife was *enceinte,* and, if such child die under twenty-one, gift over to B. The wife proved not to have been *enceinte,* but the court held, without assigning a reason, that the bequest over took effect. In *Gulliver* v. *Wickett* (1745) 1 Wils. 105, construing the same will, it was said that "whether the limitation to the

child never took effect, or whether it did, and was determined, is the same thing." Strictly, the two are not the same. *Roe* v. *Fulham* (1741) Willes 303, 309. In the final analysis the case must be explained upon the ground that the manifest intention of the testator was that the gift over should take effect if the son were not living at majority, or that by necessary implication the condition expressed included the contingency of there being no child. In either view the condition was performed. Cf. *Mackinnon* v. *Sewell* (1833) 2 My. & K. 202. The doctrine of *Jones* v. *Westcombe, supra,* was applied where there was a gift over in case the first devisee leave only one child, and no child was left. *Murray* v. *Jones* (1813) 2 Ves. & B. 313, and where there was a gift over, if the first devisee failed to do a certain act after the testator's death. *Scatterwood* v. *Edge* (1689) 1 Salk. 229; *Avelyn* v. *Ward* (1749) 1 Ves. 420. The line was more closely drawn between these cases and those like *Doo* v. *Brabant, supra,* where there was a void gift to a charity, and, if a certain event should not occur, gift over. In *Philpott* v. *St. George's Hospital* (1846) 21 Beav. 134, the condition was that a suitable piece of ground should be provided. The land was provided, and therefore the gift over was not given effect. This case was considered by the House of Lords in *Hall* v. *Warren* (1861) 9 H. L. C. 420 [see *Warren* v. *Rudall* (1858) 4 K. & J. 603, in the lower court] where the gift over was to take effect in case a committee should not be appointed. No committee was in fact appointed, and upon this narrow ground the case was decided. But two of the lords agreed with the lower court that the case also came within the principle of *Jones* v. *Westcombe, supra,* and evinced a disposition to overrule *Philpott* v. *St. George's Hospital, supra,* despite the fact that there the expressed condition had been performed. Rules drawn from the immediately preceding cases, by their terms apparently applicable to all in which the prior disposition has failed, naturally have led to confusion. Following Lord Hardwicke's statement in *Avelyn* v. *Ward, supra,* that "if the preceding limitation by what means soever is out of the case, the subsequent limitation takes place," Fearne, Con. Rem. (6th Ed.) 360, lays down the rule that where there is a devise over after a preceding limitation, or upon a condition annexed to a preceding estate, if the preceding estate could not take effect, the disposition over nevertheless will take place, because, in order to give effect to the subsequent limitation, the preceding estate is not to be considered as a condition. If taken literally this would invalidate the result reached in cases like *Doo* v. *Brabant, supra,* for in all of them the first disposition is doubtless out of the way. That this is not the true doctrine of the English courts is shown by the fact that *Doo* v. *Brabant, supra,* has been consistently followed. *Humberstone* v. *Stanton* (1813) 1 Ves. & B. 385; *Wing* v. *Angrave* (1860) 8 H. L. C. 183; *Elliott* v. *Smith* (1878) 22 Ch. Div. 236. Whatever may be considered the exact line of demarcation, *Mackinnon* v. *Sewell, supra; Warren* v. *Rudall, supra,* the principle of *Jones* v. *Westcombe* cannot be applied where, if the first devisee had been in existence, or if in existence legally qualified to take, the event had occurred upon which his estate was to become absolute. Cf. 2 Jarman, Wills, 833, 835.

In a recent New York case a testatrix devised her estate to A for life,

at A's death one half to B, and if B die before A, then to B's children. B died after A, and both died before the testatrix. The court, following Fearne's rule, *supra*, repeated in *Norris* v. *Beyea* (1855) 13 N. Y. 273, and in later cases, held that the limitation to the children of B took effect, despite the non-performance of the condition. *U. S. Trust Co. of N. Y.* v. *Hogencamp* (1908) 191 N. Y. 281. But in *Norris* v. *Beyea, supra*, the condition had been literally performed; likewise, in *Downing* v. *Marshall* (1861) 23 N. Y. 366; *McLean* v. *Freeman* (1877) 70 N. Y. 81; *Wager* v. *Wager* (1884) 96 N. Y. 164; *Miller* v. *Winship* (1899) 161 N. Y. 71. On the other hand, in *Savage* v. *Burnham, supra*, where the testator devised the beneficial interest in a trust estate to his children, and if any of them should die under twenty-one, his share to be divided among the remaining children, and two of the sons died after attaining twenty-one, it was held in accordance with *Doo* v. *Brabant, supra*, that the gift over did not take effect. This decision seems to have been overlooked by the court in the principal case. *Williams* v. *Jones* (1901) 166 N. Y. 522, affords some apparent justification for the result reached. In that case a testatrix, evidently attempting to provide for all possible contingencies, made an ultimate disposition of the beneficial interest of a trust estate, if (1) A left surviving both wife and son, (2) only son, (3) neither of them, and in any case no issue of the son. The wife only was left. It was held, reversing the decision of the lower court, that, though none of the events provided for had occurred, the general scheme of the will showed a clear intention to make the disposition over dependent not upon the order of deaths of the *cestuis que trustent*, but upon their deaths and that of one of them without issue. Conceding this to be the correct construction, and the efforts of the testatrix to leave no contingency unprovided for points strongly to its soundness, the condition was in fact performed. In the principal case, however, there appears no evidence to show that an express condition was not intended to operate as such. The modern tendency of American courts to effectuate as fully as possible that which they consider the intention of the testator, in disregard of express terms of the will, *Young Women's Christian Home* v. *French* (1902) 187 U. S. 401, may be justified in *William* v. *Jones, supra*, but the principal case illustrates a dangerous tendency to substitute conjecture for express intention.

Determination of Rights in Church Property.—Lord Eldon's view, apparently founded upon religious conditions peculiar to England, that civil courts must decide for themselves all questions of creed, *Attorney-General* v. *Pearson* (1817) 3 Meri. 353, has never received judicial sanction in this country. *Watson* v. *Jones* (U. S. 1871) 13 Wall. 679, 733; see 6 Columbia Law Review 137. The policy of American courts has confined the determination of ecclesiastical questions as far as possible to church tribunals. *Chase* v. *Cheney* (1871) 58 Ill. 509. Logical adherence to this policy would exclude any consideration of such questions except where civil rights are involved. *White Lick etc.* v. *White Lick etc.* (1883) 89 Ind. 136. Civil courts may not, however, avoid questions of creed, if necessary for the determination of property rights. But in no case will courts

investigate the abstract truth or falsity of a doctrine, always treating questions of creed as questions of fact. *East Norway etc. Church* v. *Halvorson* (1890) 42 Minn. 503. The decision thereon of a competent church tribunal is accepted as final. *Watson* v. *Jones, supra.* On the other hand, the regularity of the proceedings of a church body is a proper subject of inquiry *Bouldin* v. *Alexander* (U. S. 1872) 15 Wall. 131.

In determining controversies over church property in each particular case, fundamental principles require the effectuation of the intention of the donor and the enforcement of an ascertained trust. *Happy* v. *Morton* (1864) 33 Ill. 398. Whether any specific limitation of creed should be implied from surrounding circumstances or original user where property is deeded to the church by name only, is a matter of dispute. Some courts strive to imply limitations, *Hale* v. *Everett* (1868) 53 N. H. 9, but, it is submitted, sounder policy, *Watson* v. *Jones, supra,* demands the avoidance of implications unless circumstances attending the gift clearly manifest the intention of the donor or purchasers to restrict the use. *Miller* v. *Gabel* (N. Y. 1845) 2 Denio 492; *Wilson* v. *Livingston* (1894) 99 Mich. 594. If, however, a limitation is found, express or implied, a material change of creed terminates the trust; the property reverts to the donor, *Venable* v. *Coffman* (1867) 2 W. Va. 310, 320; cf. 8 COLUMBIA LAW REVIEW 222, unless the grant was accompanied by consideration. In such a case it does not, upon Coke's theory, revert to the vendor, *McRoberts* v. *Moudy* (1885) 19 Mo. App. 26, but escheats to the state for similar charitable purposes. Cf. *Mormon Church* v. *United States* (1890) 136 U. S. 1. In either case, in the event of a schism, those adhering to the old creed, theoretically, should retain the use regardless of their numbers. Such is the law by the weight of authority. *Hale* v. *Everett, supra; Roshi's Appeal* (1871) 69 Pa. St. 462; but see *Stebbins* v. *Jennings* (Mass. 1830) 10 Pick. 172, 183. Whether this change of creed be local or accompany a change in the superior affiliated body, the result is manifestly the same. *App* v. *Lutheran Congreg.* (1847) 6 Pa. St. 201. An anomalous result, defeating the intention of the donor, might be reached, however, should the superior body adjudge a strictly material change immaterial. It would seem that the merits could not be inquired into unless fraud were shown. Of course, if the use of the property be subject to no limitation, express or implied, the solution is simple; the majority, as in other voluntary associations, have absolute control within the rules and regulations of the church. *Sutter* v. *First Ref. Church* (1862) 42 Pa. St. 503. Even if there be a limited trust the solution is the same where the disputed change in creed is immaterial. *Trustees etc.* v. *St. Mary's Church* (1864) 48 Pa. St. 20. Curiously enough, however, some courts, in such cases, have ordered the property to be sold and the proceeds divided *pro rata. Ferraria* v. *Vasconcellos* (1863) 31 Ill. 25. Under statutes of incorporation limitations of creed have been almost entirely disregarded. *Robertson* v. *Bullions* (1854) 11 N. Y. 243; *Parish of Bellport* v. *Tooker* (N. Y. 1859) 29 Barb. 256. However courts may desire to evade religious controversies, arbitrary disregard of the donor's express intention is inexcusable. The law has fortunately been modified in New York by a later statute. *First Presbyt. Church* v. *Bowden* (N. Y. 1880) 10 Abb.

In a recent case, *Clark* v. *Brown* (Tex. 1908) 108 S. W. 421, consequences following the merger of the Cumberland Presbyterian Church with the general Presbyterian Church required a discussion of the principles involved in the determination of rights in church property. The refusal of a part of the superior body to concur in the merger resulted in a schism in a local church, whose property was held in trust for the use of the Cumberland Church. The court decreed the use thereof to the minority, which adhered to the old creed. The grounds of the decision were the lack of constitutional authority in the superior body to merge, and a material change in creed. The opposite result was reached in *Mack* v. *Kime* (Ga. 1907) 58 S. E. 184. The court, in the latter case, construed the authority of the superior body differently, and considered the act of merger an implied adjudication that no material change was made in creed. Assuming the premise, the decision was sound; but the assumption seems unfounded. In both cases the property was originally purchased and deeded to trustees for the use of the church by name. The court, in the principal case, implied a strict limitation of creed. The Georgia court, more liberally construing the purposes of the trust, reached in this respect a result more practical and, it would seem, more progressive. As a matter of policy, courts should be slow to restrict the freedom of a church to change its religious views at the expense of the loss of its property, unless the trust be clearly limited.

Amendment of By-Laws in Mutual Benefit Associations.—The contract between a mutual benefit society and a member is one of insurance, *Commonwealth* v. *Wetherbee* (1870) 105 Mass. 149, but differs from the ordinary insurance policy in that the by-laws form a part thereof. *Barbot* v. *The Mutual Association* (1897) 100 Ga. 681. The member is both insurer and insured. *Bragaw* v. *Supreme Lodge* (1901) 128 N. C. 354. How far under the power of amendment, usually reserved in the by-laws, the society may alter the member's contract is a subject of conflicting opinion. The injustice of permitting the society to amend without limitation has led to the adoption of various rules, many of doubtful validity. The denial of power to destroy the member's contract is clearly justifiable, for, obviously, it was not his intention to confer that privilege. *Weiler* v. *Equitable Aid Union* (N. Y. 1895) 92 Hun 280. Some courts hold that the contract cannot be altered unless the member has expressly agreed to comply with future by-laws. *Peterson* v. *Gibson* (1901) 191 Ill. 365. To distinguish between an express and an implied agreement appears illogical. 4 Columbia Law Review 229. The doctrine is sometimes advanced that the face value of a member's certificate cannot be reduced, on the ground that he agreed only to a change in the by-laws and not to the avoidance of an express obligation independent of the by-laws. *Hale* v. *Equitable Aid Union* (1895) 168 Pa. St. 377; *Newhall* v. *American Legion of Honor* (1902) 181 Mass. 111. The power to amend, however, includes the power to enact new by-laws. If the new by-law affects an express term of the certificate it should not, for that reason alone, be invalid. The argument that he must have expected to receive the express amount of his certificate would apply equally

to the amount of sick benefits provided in the by-laws. These, however, may generally be altered. *Stohr* v. *Musical Fund Society* (1890) 82 Cal. 557. Another theory maintains that the member agrees only to such changes as affect his duties as insurer and not to such as affect his rights as insured, *Morton* v. *Supreme Council* (1903) 100 Mo. App. 76. unless the power to make the specific change has been reserved. Cf. *Ayers* v. *Order of United Workmen* (1907) 188 N. Y. 280. This appears to be the New York and Massachusetts view, *Weber* v. *Knights of Maccabees* (1902) 172 N. Y. 490; *Ayers* v. *Order of United Workmen, supra; Reynolds* v. *Royal Arcanum* (1906) 192 Mass. 150, but the courts are inconsistent in its application. Thus an increase in assessments is upheld. *Mock* v. *Royal Arcanum* (1907) 106 N. Y. Supp. 155; *Reynolds* v. *Royal Arcanum, supra.* The assessments, the consideration to be paid for the benefits, are as plainly a term of the contract as the benefits themselves. Logically this theory would confine the society to changes in the mere administration of its business; yet courts quite generally hold valid by-laws increasing assessments, *Fullenwider* v. *Royal League* (1899) 180 Ill. 621, or reducing the amount of sick benefits, *Stohr v. Musical Fund Society, supra,* or forbidding members to engage in certain occupations, *Loeffler* v. *Modern Woodmen of America* (1898) 100 Wis. 79, and usually by-laws avoiding liability in case of involuntary suicide. *Supreme Tent* v. *Stensland* (1902) 105 Ill. App. 267; contra, *Sautter* v. *Supreme Conclave I. O. H.* (1906) 72 N. J. L. 225. Any logical limitation of the power of amendment must be based upon the intention of the insured. That he intends to be bound by reasonable amendments only, seems a justifiable interpretation. *Thibert* v. *Supreme Lodge* (1899) 78 Minn. 448. In determining the reasonableness of an amendment, the nature and needs of a benefit society should govern. Mutuality is its primary feature. The member's duties as insurer and his rights as insured must be balanced in order to reach a just conclusion. *Hall* v. *Western etc. Ass'n* (1903) 69 Neb. 601. Conceding that the courts generally regard the member's relation as insurer as something totally distinct from its relation as insured, *Supreme Council* v. *Jordan* (1903) 117 Ga. 808, the needs of the association must still be considered in determining the validity of a by-law. It is submitted, therefore, that the insured has no absolute right to have any term of his contract remain unchanged. *Stohr* v. *Musical Fund Society, supra.* An amendment of the face value of the certificate should be valid if necessary for the perpetuation of the society. This change, however, seems never to have been allowed. *Gaut* v. *American Legion of Honor* (1901) 107 Tenn. 603. With this exception, whatever may be their express reasoning, authorities generally uphold changes necessary or desirable for the society's welfare, *Supreme Commandery* v. *Ainsworth* (1882) 71 Ala. 436, when not obviously unjust to the members, see *Wuerfler* v. *Trustees etc. Order of Druids* (1902) 116 Wis. 19; *Wist* v. *The Grand Lodge* (1892) 22 Ore. 271. Conflicting decisions merely show diverse views of a reasonable change.

Where the contingency has happened upon which the liability of the society to the beneficiary depends, no subsequent by-law can affect the debt already accrued. If benefits are payable at stated intervals, since the right

to each payment accrues only as it falls due, it would seem that future payments should be still subject to reduction if required by the needs of the society, whether the benefits are payable to the insured himself, for example, sick benefits, or to a third person. *Fugare* v. *Mutual Society of St. Joseph* (1874) 47 Vt. 362. The courts are inclined, however, to hold that where sick benefits are payable for the entire time of illness, or where death benefits are payable for the entire life of the beneficiary, a right to the series becomes vested when the member falls sick or dies. *Becker* v. *Berlin etc. Society* (1891) 144 Pa. St. 232; *Wiedynski* v. *Polish etc. Society* (N. Y. 1906) 110 App. Div. 732; *Gundlach* v. *Germania Mechanics' Ass'n* (N. Y. 1875) 4 Hun 339; contra, *Pain* v. *Société St. Jean Baptiste* (1899) 172 Mass. 319; *Poultney* v. *Bachman* (N. Y. 1883) 31 Hun 49; *Fugare* v. *Mutual Society of St. Joseph, supra.* In a recent New York case the certificate of incorporation of a benefit society provided for such sick benefits as the by-laws might from time to time prescribe. The by-laws called for payments for the entire time of illness. A reduction after the plaintiff fell ill was held reasonable in view of the depleted condition of the benefit fund. *Lewin* v. *Koerner Benevolent Ass'n* (1908) 109 N. Y. Supp. 101. The court used the proper method in determining the validity of the amendment, in accordance with the views expressed above. Though the Court of Appeals has never passed upon the validity of a by-law reducing sick benefits, it is doubtful, in view of its tendency to restrict the power of amendment, whether the case would be sustained on appeal. See *Evans* v. *Masonic Relief Ass'n* (1905) 182 N. Y. 453, and dictum in *Parish* v. *New York Produce Exchange* (1901) 169 N. Y. 34, 46.

Interference with Contractual Relations.—It has been doubted whether any action lies for inducing a breach of contract unless unlawful means have been used, *Boyson* v. *Thorn* (1893) 98 Cal. 578, or unless the relation of master and servant existed. *Chambers* v. *Baldwin* (1891) 91 Ky. 121. While in some cases in which the rule has been broadly stated, other elements were present, *Temperton* v. *Russell* [1893] 1 Q. B. 715 (coercion); *Angle* v. *Rwy.* (1894) 151 U. S. 1 (fraud); *Walker* v. *Cronin* (1871) 107 Mass. 555, it must be admitted that in England, and in many jurisdictions in this country, the procurement of a breach by lawful means is actionable, if without justification, *South Wales etc.* v. *Glamorgan Coal Co.* [1905] A. C. 239; *Bitterman* v. *Louisville etc. R. R. Co.* (1907) 207 U. S. 205; see VIII Columbia Law Review 225, irrespective of the special relation of master and servant. *Bowen* v. *Hall* (1881) L. R. 6 Q. B. D. 333; *Jones* v. *Stanley* (1877) 76 N. C. 355. Though still rejected in some jurisdictions, *Ashley* v. *Dixon* (1872) 48 N. Y. 430; *Boyson* v. *Thorn, supra,* the English rule is gaining increased recognition. *Beekman* v. *Marsters* (Mass. 1907) 80 N. E. 817; *Flaccus* v. *Smith* (1901) 199 Pa. St. 128; *Thacker Coal Co.* v. *Burke* (1906) 59 W. Va. 253. The courts generally proceed upon the ground that to induce the commission of a legal wrong is a tort. Lord Watson in *Allen* v. *Flood* [1898] A. C. 1, 96. But the action seems only an application of the broader theory that a cause of action exists "whenever one person" damages "another wilfully and intentionally, and

without just cause or excuse." Bowen, L. J., in *Skinner* v. *Shew* [1893] 1 Ch. 413, 422; cf. Holmes, 8 Harv. L. Rev. 1; Wigmore, *Ibid.* 200. Upon the same theory an action lies for interfering with contracts unenforcible under the Statute of Frauds, *Rice* v. *Manley* (1876) 66 N. Y. 82, contracts terminable at will, *Berry* v. *Donovan* (1905) 188 Mass. 353, or an established course of dealing. *Quinn* v. *Leathem* [1901] A. C. 495. It must appear that there was a reasonable probability of the continuance of the relation: otherwise, no damage is shown. *Benton* v. *Pratt* (1829) 2 Wend. 385. Since the defendant is liable only if he is the proximate cause of the harm, some courts refuse to entertain an action unless the will of the immediate actor has been overcome by coercion or fraud. *Chambers* v. *Baldwin, supra.* The objection that in any other case the cause of the damage is the voluntary act of the person induced, seems of doubtful validity. Though fraud were used he may have acted voluntarily, e. g., where induced by fraudulent statements of the plaintiff's solvency; yet if fraud were used, the action would concededly lie. Burdick, Torts, 70. Moreover, procurement of the commission of a tort, as of the publication of a libel, by persuasion, is generally admitted actionable. *Schoefflin* v. *Coffey* (1900) 162 N. Y. 12. Accordingly, by the better view, the defendant is held responsible if his interference was calculated in the ordinary course of events to damage, and has in fact damaged, the plaintiff. Bowen, L. J., in *Mogul S. S. Co.* v. *McGregor* (1889) 23 Q. B. D. 598, 613. Cf. "*Squibb Case.*" Mere advice, Coleridge, J., dissenting, in *Lumley* v. *Gye* (1853) 2 E. & B. 216, or a bare offer to purchase goods already contracted for, *Beekman* v. *Marsters, supra,* would not ordinarily constitute the defendant the proximate cause. Whether the defendant in fact procured the breach, is a proper question for the jury. *Doremus* v. *Hennessey* (1898) 176 Ill. 608. Assuming damage and the defendant's responsibility, the defendant is liable unless justification or excuse appears. *South Wales etc.* v. *Glamorgan Coal Co., supra.* Here is a legitimate field for conflict of opinion. Excuse and justification are matters of public policy. Divergencies in the authorities are attributable to different views thereof. The present tendency is toward a broader conception of civil duty. Pollock, 24 Law Quart. Rev. 109; cf. *Rich.* v. *N. Y. etc. R. R. Co.* (1882) 87 N. Y. 382; *London Guaranty etc. Co.* v. *Horn* (1903) 206 Ill. 493. The use of fraud or physical intimidation has always been regarded unjustifiable; Burdick, Torts, 70, 71; likewise, on principle, moral coercion. Cf. *Nat'l Prot. Ass'n* v. *Cumming* (1902) 170 N. Y. 315. On the other hand, fair competition excuses interference with contracts terminable at will, *Allen* v. *Flood, supra,* or with an established course of dealing. *Mogul S. S. Co.* v. *McGregor* [1892] A. C. 25. American courts, contrary to the English view, *Allen* v. *Flood, supra,* incline to make motive material, *London Guaranty etc. Co.* v. *Horn, supra; Berry* v. *Donovan, supra;* Huffcut, 18 Harv. L. Rev. 439, an extension perhaps verging upon paternalism. Where a binding contract exists, however, no legitimate interest of competition is subserved by excusing interference. At least, in England, it would seem, *Lumley* v. *Gye, supra,* and in Massachusetts, *Beekman* v. *Marsters, supra,* competition is no defense. No doubt, however, under some circumstances, still unsettled, inducing a breach may be justifiable. Cf. *South Wales etc.* v. *Glamorgan Coal Co., supra.*

A recent English case, *Natl. Phonograph Co.* v. *Edison-Bell etc. Co.* (C. A. 1907) 77 L. J. Ch. 218, involved the application of these principles to a novel set of facts. The plaintiff, a manufacturer, sold phonographs to B under an agreement not to resell to any blacklisted retailer. The defendant, plaintiff's competitor, obtained phonographs, first, from B through agents who fraudulently posed as independent retailers, and, second, without fraud, through one Ell, a retailer, who did not know that the defendant was blacklisted. It was held that, in the first transaction, irrespective of whether B had broken his contract, the defendant was liable for having fraudulently induced B to act contrary to the contractual duty which B owed the plaintiff; that in the Ell transaction there was no liability since no contract between Ell and the plaintiff was shown or, conceding a contract, no fraud was present. Assuming, first, that in both transactions a contract was broken, the distinction based upon the presence or absence of fraud is unsupported by the English authorities, *supra,* for, if a breach is induced, the means used are immaterial. Assuming, however, that contracts existed, but were unbroken, the result in the principal case seems sound. Competition justified interference except where fraud was present; for the duty violated by the defendant was not the duty to refrain from inducing a breach of contract, and the stricter protection demanded by policy in the latter case is not in the principal case required. The decision, viewed in this light, is a further step in the development of the broader theory of tort. Pollock, *supra.*

RECENT DECISIONS.

NORMAN S. GOETZ, *Editor-in-Charge.*

ADMIRALTY—JURISDICTION—MARITIME TORT.—A pier of the plaintiff's bridge was injured by the defendant's vessel. *Held,* admiralty did not have jurisdiction since the injury was consummated on land. *Cleveland etc. Ry. Co.* v. *Cleveland Steamship Co.* (1908) 28 Sup. Ct. Rep. 414.

Though the nature of the contract was early contended for as a test of admiralty jurisdiction of contract, 8 COLUMBIA LAW REVIEW 136; *De Lovio* v. *Boit* (1815) 2 Gall. 398, the locality test was the only one ever urged as to torts. *Smith* v. *Braye* (1541) 6 Sel. Soc. Publ. 211; Brown, Civil and Admiralty Law, 110. *The Plymouth* (1865) 3 Wall. 20, adopted in the United States the locality test, e. g. that admiralty had no jurisdiction if the tort was consummated on the land. *The Blackheath* (1904) 195 U. S. 361, holding a vessel liable for injury done a beacon fastened to the bottom, was variously construed as departing from the locality test and adopting the rule that admiralty will take jurisdiction of any injuries done by a vessel in the course of navigation. *West* v. *Martin* (Wash. 1907) 92 Pac. 334; *Bowers etc. Co.* v. *Contracting Co.* (1906) 148 Fed. 290, 294; contra, *The Curtin* (1907) 152 Fed. 588. The principal case repudiates such a construction of *The Blackheath, supra,* and limiting that case to its facts, reaffirms the locality rule. The principal case seems sound by the great weight of authority. *The Neil Cockran* (1872) Brown Ad. 162; see *U. S.* v. *Bedford* (1847) Fed. Cas. 15867, p. 119. Much is to be said, from the view-point of a scientific classification of admiralty jurisprudence, for the adoption of the maritime nature test as to both torts and contracts. But it is submitted, the adoption of such a test would restrict a jurisdiction the courts are prone to widen, *The Genesee Chief* (1851) 12 How. 443, by limiting it to torts committed by a vessel as an instrument of navigation or commerce, cf. *Doolittle* v. *Knobeloch* (1889) 39 Fed. 40, and this with the practical difficulties of application should outweigh the academic considerations above mentioned.

ADMIRALTY—JURISDICTION—SUITS FOR CONTRIBUTION.—Vessel X., damaged through the joint negligence of vessels A. and B., recovered in the state court from the owner of A., who failed to avail himself of a statutory provision for bringing in the joint tort-feasor. *Held,* admiralty had no jurisdiction of a suit by the owner of A. to enforce contribution from B. *The Lehigh Valley R. R. Co.* v. *The Tug Ira M. Hedges* (1908) 39 N. Y. Law Jour. No. 16.

Just as Chancery, in order to furnish a complete remedy and avoid circuity of suit, may grant a characteristically common law remedy,—for example, assess and decree the amount of loss in addition to compelling specific performance of a contract to issue an insurance policy, *Tayloe* v. *Merchants' Fire Ins. Co.* (1850) 9 How. 390,—so admiralty, though it "does not claim the character of a court of general equity," *The Juliana* (1822) 2 Dodson's Adm. 504, 521; Edwards, Adm. Jur. 31, once its appropriate jurisdiction has attached, may award equitable relief incidentally. *The Saracen* (1847) 11 Jurist 253, esp. 255; Benedict, Adm. (3d Ed.) 329. If, therefore, in the principal case, the suit to recover damages for the collision had been brought in admiralty, contribution could have been enforced as an incident of the joint liability in admiralty, which must be satisfied before complete justice is done. *Erie R. R. Co.* v. *Erie etc. Co.* (1907) 204 U. S. 220. However, since the owner of X. sued at common law, the initial jurisdiction entitling admiralty to administer equitable relief in the principal case was lacking, *Kellum* v. *Emerson* (1854) 2 Curt. C. C. 79; *Davis* v. *Child* (Me. 1840) Daveis 71; *Grant* v. *Poillon* (1857) 20 How. 162, and the court's refusal to entertain the action as being essentially a bill in equity was correct.

ATTORNEY AND CLIENT—COMPENSATION FOR ADVOCACY.—In a suit to recover for services as counsel, the plaintiff failed to prove an express contract for a specific compensation. *Held,* without such a contract, the services were presumed to be gratuitous. *Bently* v. *Fidelity and Deposit Co.* (N. J. 1908) 69 Atl. Rep. 202.

The civil law doctrine, that a patron's advocacy of his client's cause was gratuitous, 3 Bl. Comm. 28; *Adams* v. *Stevens* (N. Y. 1841) 26 Wend. 451, 453, has always obtained in England as to barristers, whose fees are deemed *honorarium. Moor* v. *Row* (1630) 1 Ch. Rep. 38; *Kennedy* v. *Broun* (1863) 13 C. B. (N. S.) 676. But the fees of attorneys, conveyancers, and special pleaders below the bar are recoverable. *Poucher* v. *Norman* (1825) 3 B. & C. 744; *Queen* v. *Doutre* (1884) L. R. 9 App. Cas. 745, 751. The reason advanced for this distinction is that, owing to the privileges and responsibilities attached to advocacy, contracts of hiring would affect the sincerity of barristers and lower the dignity of the court. *Kennedy* v. *Broun, supra.* Though working no hardship in England, the general usage being pre-payment, *Adams* v. *Stevens, supra,* the rule would be totally unsuited to the American credit system, and, outside of a few early cases, *Brackenridge* v. *McFarlane* (Pa. 1793) Add. 49; *Mooney* v. *Lloyd* (Pa. 1819) 5 S. & R. 411; *Law* v. *Ewell* (1817) 2 Cranch C. C. 144, subsequently overruled, *Foster* v. *Jack* (Pa. 1835) 4 Watts. 334; and see *Mowat* v. *Brown* (1884) 19 Fed. 87, no distinction has been made by our courts between the fees of attorneys and counsel. All branches of the profession may recover for services on a contract express or implied, *Adams* v. *Stevens, supra,* and see cases cited in 3 Am. & Eng. Encyc. 414, save in the jurisdiction of the principal case (N. J.) where no recovery is allowed for counsel's services in the absence of an express contract fixing a specific compensation. *Hopper* v. *Ludlum* (1879) 41 N. J. L. 182. And see *Schomp* v. *Schenck* (1878) 40 N. J. L. 195.

ATTORNEY AND CLIENT—DISBARMENT—SUMMARY JURISDICTION OVER ATTORNEYS.—The relator applied for an order requiring the respondent to repay moneys received as attorney. Since the transaction, the respondent had been disbarred. *Held,* the court could exercise its summary jurisdiction over him though disbarred. *Matter of Burnham* (1908) 39 N. Y. Law Jour. 240.

An attorney, being an officer of the court, is amenable for acts of official misconduct to the court's power of summary punishment. 2 Greenl. Ev. (15th Ed.) § 147; *Anderson* v. *Bosworth* (1887) 15 R. I. 443. Under this quasi-criminal procedure, courts can punish acts casting odium upon the administration of justice, 4 Bl. Comm. *283; *Schell* v. *Mayor* (1891) 128 N. Y. 67, and, by safeguarding the honesty of the bar, foster the relation of attorney and client. See *Matter of Langslow* (1901) 167 N. Y. 314, 320. Formerly an attorney was liable to the summary jurisdiction only for misconduct in a pending suit, see *DeWoolfe* v. ——— (1822) 2 Chitty Rep. 68, but now the power extends to all matters in which an attorney is engaged professionally. *In re Aitkin* (1820) 4 B. & A. 47; *Ex parte Statts* (N. Y. 1825) 4 Cow. 76. While an attorney is not liable for misconduct prior to admission, *In re Williams* (1836) 5 Dowl. Rep. 236, the rationale of the jurisdiction being misfeasance in office, *In re Paschal* (1870) 10 Wall. 483, he cannot, on principle, escape liability by ceasing to be an attorney. *Simes* v. *Gibbs* (1838) 1 W. W. & H. 40. Though there is little authority in point, the maxim "once an attorney, always an attorney," seems to have been accepted without criticism. Lush, Prac. 274; Weeks, Attor. § 77; 3 Am. & Eng. Encyc. 414. Similarly, the jurisdiction of military tribunals over persons no longer in the service for offenses committed therein has been upheld. *In re Bird* (1871) 3 Fed. Cas. 425; *In re Bogart* (1873) 3 Fed. Cas. 796. The principal case correctly held the respondent's disbarment no bar to the proceedings.

CARRIERS—LIMITATION OF VALUE BY AGREEMENT—PARTIAL LOSS.—An express shipment was made under a contract providing "unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars." A partial loss occurred. *Held,* the plaintiff could recover only such proportion of fifty dollars as the value of the part lost bore to the actual value of the whole shipment. *Meyer* v. *Weir* (1908) 39 N. Y. L. J. 359.

There is a hopeless conflict in the construction courts have given contracts such as in the principal case. *Stearnes* v. *R. R. Co.* (1892) 91 Tenn. 516; *Michalitshke* v. *Wells Fargo* (1897) 118 Cal. 683. Some courts construe them as merely fixing the limitation on the carrier's liability, *Brown* v. *Steam. Co.* (1888) 147 Mass. 58, but the sounder view, and that followed by the principal case and the weight of authority, is that the parties have agreed upon the value of the article for purposes of transportation. *O'Mally* v. *Ry. Co.* (1902) 86 Minn. 380; *Hart* v. *Pa. R. R. Co.* (1884) 112 U. S. 331. Under the former construction the shipper can recover such damage as he sustains, if not in excess of fifty dollars; but, in the principal case, recovery was correctly allowed since when he agrees that the whole value shall be considered fifty dollars, impliedly one-half is worth twenty-five dollars. This construction gives effect to the whole instrument, and seems to carry out the intention of the parties, who could not have intended the same recovery for a partial loss as for a destruction of the whole. *U. S. Ex. Co.* v. *Joyce* (1905) 36 Ind. App. 1; *Goodman* v. *Ry. Co.* (1895) 71 Mo. App. 460; contra, *Nelson* v. *Ry. Co.* (1903) 28 Mont. 297; *Stearnes* v. *R. R. Co., supra.* Since the shipper, under a construction contrary to the principal case, would be demanding of the carrier the same responsibility to a part that he agrees shall be his liability for the whole, the contract would be a fraud on the carrier.

CARRIERS—REGULATION OF RATES—ENTIRE BUSINESS AS A UNIT.—In a suit testing the validity of a legislative reduction of passenger rates, the state offered evidence of the entire income of the road. *Held,* inadmissible. *Penn. R. R. Co.* v. *Phila. Co.* (1908) 68 Atl. 676.

A road, still earning a profit upon its entire investment, may be compelled to operate a branch of its system at a loss, *St. Louis etc. Ry. Co.* v. *Gill* (1895) 156 U. S. 649, or to reduce a single rate so low that, were similar rates charged upon all its traffic, it would not earn a fair return. *Minneapolis etc. R. R. Co.* v. *Minnesota* (1902) 186 U. S. 257. The same rule seems tacitly recognized, as it should be on principle, in *Smyth* v. *Ames* (1898) 169 U. S. 466, as to passenger rates, and adopted by several state courts. *Pensacola etc. R. R. Co.* v. *Florida* (1889) 25 Fla. 310; *Railroad Co.* v. *Smith* (1889) 60 Ark. 221. Logically, this rule would permit reduction however extreme, but it is modified by the principle that an arbitrary rate not for the public interest, or discriminating between shippers is *per se* unconstitutional. *Lake Shore etc. Ry. Co.* v. *Smith* (1899) 173 U. S. 684. Cf. *Wisconsin etc. R. R.* v. *Jacobson* (1900) 179 U. S. 287, 301, 302. In completely rejecting evidence of entire income, the principal case seems unsound. The impracticability of separately estimating the income and cost of operation in the two departments of traffic is patent. 8 COLUMBIA LAW REVIEW, 265.

CONSTITUTIONAL LAW — DUE PROCESS — ADMINISTRATION — ABSENTEES. — A Massachusetts statute allowed a Probate Court, upon proper application and after due notice by publication, to appoint a receiver for the property left within the State by any person whose whereabouts had become unknown. It was further provided that, after fourteen years of such unexplained absence, the property should be distributed and the absentee's claims thereto barred. *Held,* the statute was constitutional. *Nelson* v. *Blinn* (Mass. 1908) 83 N. E. 889.

A grant of letters of administration on the estate of a person wrongly supposed to be dead, is void, *Thomas* v. *People* (1883) 107 Ill. 517; *Scott*

v. *McNeal* (1894) 154 U. S. 34; contra, *Rodcrigas* v. *Savings Institution* (1875) 63 N. Y. 460; cf. s. c. (1879) 76 N. Y. 316, no matter how strong the presumption from continued absence; since death is prerequisite to the ordinary jurisdiction of a Probate Court. *Springer* v. *Shavender* (1896) 118 N. C. 33. But in several States a certain limited control over the property of absentees as such has also been conferred. I Woerner, Amer. Law of Admin., (2nd Ed.) § 212. In only two of the six previous cases, however, have such statutes stood the test of the Fourteenth Amendment. *Barton* v. *Kimmerley* (1905) 165 Ind. 609; *Cunnius* v. *Reading School District* (1903) 206 Pa. St. 469; s. c. (1904) 198 U. S. 458. Thus, on the ground that the proceedings must, unlike, of course, ordinary administration, include notice to the original owner, a North Dakota statute was held unconstitutional. *Clapp* v. *Houg* (1904) 12 N. D. 600. See *Lavin* v. *Bank* (1880) 1 Fed. 641; *Selden's Ex'rs* v. *Kennedy* (1906) 104 Va. 826. Since the prime practical necessity of sustaining a grant of administration is the protection of third parties dealing with the administrator, the absentees statutes may well imply, and two of them, Pennsylvania, 1885, Pub. Laws, 155, *Cunnius* v. *Reading School District, supra;* Vermont, St. 1894, § 2387, expressly stipulate, that nothing therein shall validate the title of the distributees. Cf. *Czech* v. *Bean* (N. Y. 1901) 35 Misc. 729, 732. In cutting off absolutely a returning absentee's rights against his "distributees," the Massachusetts statute stands alone. The court's theory was that this bar is in the nature of a statute of limitation. But as the bar attaches without any adverse possession by the beneficiaries, the full period of absence is rather, in effect, treated as raising a conclusive presumption of abandonment, and the ownerless property, instead of being taken by the State for its own use, is turned over to the persons who would have acquired it under ordinary administration proceedings. Cf. *Carr* v. *Brown* (1897) 20 R. I. 215; see also 6 Columbia Law Review 267.

Constitutional Law—Extradition—Fugitive from Justice.—A defendant was extradited from Rhode Island, but, before trial, the indictment was quashed in New York, and the accused returned to Rhode Island. A second extradition was sought on another indictment for the same offense. *Held,* being a fugitive, he could be extradited. *Bassing* v. *Cady* (1908) 208 U. S. 386.

A person whose extradition is demanded of a governor must be charged with a crime against the laws of the demanding state, and be a fugitive from that state. *Roberts* v. *Reilly* (1885) 116 U. S. 80. If the papers are regular, a *prima facie* case exists for a warrant, and the accused is remitted to the courts for relief. *In re Mohr* (1883) 73 Ala. 506. Courts differ as to whether a prisoner may challenge the first requirement, *supra,* but the determination of whether the accused is a fugitive from justice is one of fact and disputable. *Hyatt* v. *People* (1902) 188 U. S. 691. One who was in the demanding state at the time of the crime's commission, and is not within that state to answer its criminal process, may be extradited as a fugitive from justice, regardless of his purpose in leaving. *Appleyard* v. *Mass.* (1906) 203 U. S. 222. Thus, a conscious sense of seeking asylum is unnecessary. *State* v. *Richter* (1887) 37 Minn. 436; *Appleyard* v. *Mass., supra.* However absence from the demanding state at the date of the crime's commission is a defense. *Ex parte Reggel* (1884) 114 U. S. 642. So constructive presence within a state is not sufficient to justify extradition, *Jones* v. *Leonard* (1878) 50 Ia. 106, but this rule may lead to a failure of justice. See *State* v. *Hall* (1894) 115 N. C. 811. There being no double jeopardy, *Dulin* v. *Lillard* (1895) 91 Va. 718, the principal case represents the application of sound rules to novel facts.

Constitutional Law-Suits against the State.—An attorney general, who was under no special duty to enforce a statute, was enjoined from instituting proceedings thereunder. In violation of the injunction he sought a

mandamus. Being held in contempt, he sued out a habeas corpus alleging that the suit was against the state. *Held*, the writ should be dismissed. *Ex parte Young* (1908) 28 Sup. Ct. Rep. 442.

The principal case reaffirms the doctrine of *Smyth* v. *Ames* (1899) 169 U. S. 466 and *Reagan* v. *Farmers' Loan etc. Co.* (1894) 154 U. S. 362, that a state officer may be enjoined from using the state courts to enforce an unconstitutional statute, which affects the state only in its general welfare. The decision does not necessarily question *In re Ayers* (1887) 123 U. S. 443, that where the result affects the state in its corporate capacity its officers may not be so restrained, but does cast much doubt on the illogical qualification of *In re Ayers, supra,* adopted in *Fitts* v. *McGhee* (1899) 172 U. S. 516, that state officers may not be enjoined unless they are especially charged with the enforcement of the statute.

For a criticism of *Fitts* v. *McGhee, supra,* and a discussion of the principles involved in suits against the state see 7 COLUMBIA LAW REVIEW 609, and also "The Eleventh Amendment," 8 COLUMBIA LAW REVIEW 183.

CORPORATIONS—MUTUAL BENEFIT ASSOCIATION—EXPULSION.—Under a by-law providing for expulsion for unbecoming conduct, a member of an incorporated benefit society was expelled for testifying on the witness stand against the society. *Held,* his conduct not being considered unbecoming, his expulsion was unjustifiable. *St. Louis Ry.* v. *Thompson* (Tex. 1908) 108 S. W. 453.

Expulsion from a voluntary association may be reviewed, only if property rights are involved. *Otto* v. *Tailors' Union* (1888) 75 Cal. 308; *Rigby* v. *Connol* (1880) 14 Ch. Div. 482. But courts will always review proceedings involving expulsion from a membership corporation, since a member has property in the corporate franchise. *State* v. *Georgia Medical Society* (1869) 38 Ga. 608. However there will be no interference unless the society acted contrary to its customs, or natural justice, or in bad faith, *De Yturbide* v. *Metropolitan Club* (1897) 11 App. D. C. 180, and normally, since a member in joining consents to accept liability to expulsion according to the rules of the order, its decision on the merits is conclusive. *Spillman* v. *The Home Circle* (1892) 157 Mass. 128; *Pitcher* v. *The Board of Trade* (1887) 121 Ill. 412. Many jurisdictions, guided by an aversion to the forfeiture of benefit privileges etc., will look to the reasonableness of the conclusion where the by-law regulating expulsion allows the tribunal a wide discretion. *People* v. *Cotton Exchange* (N. Y. 1876) 8 Hun 216; *People* v. *MacDonough* (N. Y. 1896) 8 App. Div. 591. Thus, whether conduct is that unbecoming a gentleman will be considered. *State* v. *Georgia Medical Society, supra.* Logically the sufficiency of the evidence should go only toward determining the good faith of the expulsion, *Dawkins* v. *Antrobus* (1879) 17 Ch. Div. 615, but the principal case accords with the weight of authority.

CORPORATIONS—RELIGIOUS SOCIETIES—DETERMINATION OF RIGHTS IN CHURCH PROPERTY.—The Cumberland Presbyterian Church and the Presbyterian Church of the United States decided to unite. A schism resulted in a local church affiliated with the former. *Held,* the minority were entitled to the use of the church property held on a trust for the propagation of a particular creed. *Clark* v. *Brown* (Tex. 1908) 108 S. W. 421. See NOTES, p. 402.

DOMESTIC RELATIONS—COHABITATION—EVIDENCE OF MARRIAGE.—A, the wife of B, "married" C in 1867, and they lived together as man and wife until her death in 1903, B having died in 1884. *Held,* C was A's widower. *Geiger* v. *Ryan* (1908) 108 N. Y. Supp. 13.

Since marriage is a contract, if one of the parties, owing to a prior marriage, is incapable of assenting, the second marriage is void, *Riddlesden* v. *Wogan* (1601) 2 Cro. Eliz. 858; *Reeves* v. *Reeves* (1870) 54 Ill. 332, and cannot be ratified, *Thompson* v. *Thompson* (1874) 114 Mass. 566. The innocence of the other party is immaterial, lack of mutuality invalidating

the contract as to both. *Williams* v. *Williams* (1879) 46 Wis. 464; *Cartwright* v. *McGown* (1887) 121 Ill. 388. Upon removal of the impediment, the amount of evidence requisite to prove a new marriage depends upon circumstances, there being a strong presumption of marriage from cohabitation apparently matrimonial. *Cargile* v. *Wood* (1876) 63 Mo. 501; *Hynes* v. *McDermott* (1883) 91 N. Y. 451. While recognizing the soundness of the foregoing propositions, yet courts have reached opposite results in applying them to facts similar to the principal case. Some hold that marriage may be presumed from continued cohabitation after removal of the impediment, *Robinson* v. *Ruprecht* (1901) 191 Ill. 424; *State* v. *Worthingham* (1877) 23 Minn. 528; others require additional affirmative evidence to prove that relations, originally illicit, have been rendered lawful by a subsequent actual marriage. *Cartwright* v. *McGown, supra; Williams* v. *Williams, supra; Hunt's Appeal* (1878) 86 Pa. St. 294; *Collins* v. *Voorhees* (1891) 47 N. J. Eq. 315. On considerations of public policy, the decisions of the former group, favored by text writers, 1 Bish. Mar. Sep. & Div. § 970; 4 Wig. Ev. § 2505 (2), are preferable.

Domestic Relations—Wife's Services and Earnings—Effect of Modern Statutes on Husband's Recovery.—The husband sued for the loss of his wife's services as a clerk in his store. *Held*, Ellison J. dissenting, under the Married Woman's Acts the compensation for the injury to the wife's ability to do other than ordinary domestic labor belonged to her alone. *Kirkpatrick* v. *The M. Street Ry. Co.* (Mo. App. 1908) 107 S. W. 1025.

The Married Woman's Acts, regulating the separate estates of married women, were passed to give an abandoned wife the right to retain her earnings, which at common law belonged to the husband. But, under such statutes, the husband is presumptively entitled to her earnings. *Plummer* v. *Trost* (1884) 81 Mo. 425; 1 Columbia Law Review 321. This presumption may be rebutted if the wife works for third parties, *Railway Co.* v. *Twiname* (1889) 121 Ind. 375; contra, *Birbeck* v. *Ackroyd* (1878) 74 N. Y. 356, or if the husband has abandoned her, *Smith* v. *The Ry. Co.* (1893) 119 Mo. 246, or if she habitually follows a separate employment, *Flemming* v. *Shenandoah* (1885) 67 Ia. 505; *Brooks* v. *Schwerin* (1873) 54 N. Y. 343, unless this is a blind to creditors. *Hazelbaker* v. *Goodfellow* (1872) 64 Ill. 238. The statute did not change the marital status. The husband still has the right to her domestic services, though he cannot compel her to render more than this; any other assistance is regarded as a donation to him, *Coleman* v. *Burr* (1883) 93 N. Y. 17, for, on considerations of public policy, they cannot contract with reference to such services unless they are connected with her separate business or estate. *Blaechinska* v. *Howard Mission* (1892) 130 N. Y. 497. But see *Standen* v. *The P. R. R. Co.* (1906) 214 Pa. 189; *Monahan* v. *Monahan* (1903) 77 Vt. 133. Having such a separate estate, she may be the partner of her husband, *Dunifer* v. *Jecko* (1885) 87 Mo. 282, and she alone may recover damages for loss of services rendered to such separate estate. *City of Wyandotte* v. *Agan* (1887) 37 Kan. 528; *Fife* v. *Oshkosh* (1895) 89 Wis. 540. Where the services belong to the husband, he alone can recover for their loss. *Blaechinska* v. *Howard Mission, supra.* The unique construction of the statute in the principal case is opposed to a previous Missouri decision. *Plummer* v. *Trost, supra.*

Eminent Domain—Property Already Devoted to a Public Use.—A railroad company sought to condemn land essential to the operation of public gas works. The railroad company did not show its absolute need for the property. *Held*, the subsequent use being more advantageous to the public, the plaintiff could condemn. *N. Y. Central & H. R. Co.* v. *Dailey* (1908) 109 N. Y. Supp. 503.

Property already devoted to a public use may not be appropriated to another use unless authority is granted to the subsequent condemnor

expressly or by implication. *Inhab. of Springfield* v. *Conn. Ry. Co.* (Mass. 1849) 4 Cush. 63. When the uses are consistent a reasonable need for the property will warrant such an implication. *R. R. Co.* v. *Ry. Co.* (1874) 77 Pa. 173; *Albany R. R.* v. *Brownell* (1862) 24 N. Y. 345. But where the uses are inconsistent authority will be implied, only if an absolute necessity exists, e. g., if the subsequent condemnor's grant can only be so effectuated, and then even though the appropriation result in the taking of property essential to the enjoyment to the condemnee's franchise. *Central Bridge Corp.* v. *Lowell* (Mass. 1855) 4 Gray 474; *Turnpike Road* v. *R. R. Co.* (1895) 81 Md. 247. When the subsequent appropriation will seriously impair, though not wholly prevent the existing use's continuance, courts disagree as to whether a reasonable or an absolute need implies authority. *Prospect Park etc. Co.* v. *Williamson* (1883) 91 N. Y. 552; *Barre R. R. Co.* v. *R. R. Cos.* (1888) 61 Vt. 1; *Waterpower Co. v. R. R. Co.* (Mass. 1839) 23 Pick. 360. The better view seems that mere convenience to the condemnor should not raise such an implication but that absolute necessity should be shown. Since the plaintiff in the principal case did not show an absolute necessity, the decision seems unsound. *Barre R. R. Co.* v. *R. R. Cos., supra.* Since the plaintiff's right of eminent domain rests on legislative grant, the assumption that its exercise is within the court's discretion seems unwarranted. But the case represents a tendency to favor the condemnor if his use will result more advantageously to the public. *East Hampton* v. *Conn.* (1891) 154 Mass. 424.

EQUITY—MUTUAL ERROR OF LAW.—Both parties to a transaction labored under the mistaken impression that the grantor was entitled under a deed to a one-third interest only, and not to a fee-simple estate, as was actually the case. *Held*, on the theory that mistake of private antecedent rights, "analogous to, if not identical with, a mistake of fact," was relievable, equity could rescind the conveyance. *Burton* v. *Haden* (Va. 1908) 60 S. E. 736. See NOTES, p. 484.

An agent and a third party erroneously supposed that their intention to bind the agent's principal only was carried out by the terms of the agreement adopted, whereas, in truth, not the principal alone, but the agent himself, was also bound. *Held*, on the theory that the mistake was pure error of fact, equity could grant relief. *Eustis Mfg. Co.* v. *Saco Brick Co.* (Mass. 1908) 84 N. E. 449. See NOTES, p. 484.

EVIDENCE—ADMISSIONS BY SILENCE WHILE UNDER ARREST.—In a criminal trial accusations against the defendant while under arrest were admitted as evidence. No evidence of the defendant's conduct under the circumstances was produced. *Held*, McClellan, J., dissenting, as the accusations called for a denial, it was competent. *Raymond* v. *State* (Ala. 1908) 45 So. 895.

Under the proper circumstances silence in the face of an accusation is *prima facie* an admission of guilt. *Surber* v. *State* (1884) 99 Ind. 71; *Donnelly* v. *State* (N. J. 1857) 2 Dutch. 463. The accusation must, however, call for a reply. Thus, the admission is rebutted if there be no motive to reply, *Lawson* v. *State* (1852) 20 Ala. 65, or the party be incapacitated, *Gowen* v. *Bush* (1896) 76 Fed. 349, or there be a deterrent, e. g., fear, *Bob* v. *State* (1858) 32 Ala. 560, or the accusation be made at a judicial hearing, *State* v. *Mullins* (1890) 101 Mo. 514, since silence then is not assent. The proponent must show that the accused was present, *People* v. *Philbon* (1903) 138 Cal., 530, and some jurisdictions require further that he show the accused, with knowledge of the facts, *Robinson* v. *Blen* (1841) 20 Me. 109; *Edwards* v. *Williams* (1838) 2 How. Miss. 846, heard and understood the charge. *Jones* v. *State* (1880) 65 Ga. 147. Courts disagree as to the competency of accusations made while the defendant is under arrest. Some hold it inadmissible since the accused might reasonably believe he had no right to speak. *Commonwealth* v. *Kerney* (Mass. 1847) 12 Metc. 235; *State* v. *Murray* (1895) 126 Mo. 611. However, the weight of authority is

opposed to this view, *Kelly* v. *People* (1874) 55 N. Y. 565, but, while admitting it, regard the admission as of little force. *Reg.* v. *Jankowski* (1866) 10 Cox C. C. 365; *Green* v. *State* (1896) 97 Tenn. 50. However, the accusation is only admissible to show its effect on the defendant's conduct, from which alone an admission may be implied and, therefore, it may be expunged if there is no proof of resulting conduct. *People* v. *Mallon* (1894) 103 Cal. 513. In the principal case, with a proper objection, a different result would have been correct.

FOREIGN CORPORATIONS—CONSTITUTIONAL LAW—CONTRACT WITH THE STATE.—A foreign railway corporation, doing business in Missouri, invested capital, relying upon the Laws of 1870 which imposed upon such corporations the same rights and duties as upon domestic ones. The Laws of 1907 provided that the license to do intrastate business should be revoked upon the removal of a suit to the federal courts. *Held*, the latter act impaired the obligation of the contract arising under the former. *Chicago etc. Ry. Co.* v. *Swanger* (1908) 157 Fed. 783.

A foreign corporation's license may be revoked at will, *Security etc. Ins. Co.* v. *Prewitt* (1905) 202 U. S. 246, subject to constitutional limitations, cf. *Pembrina etc. Co.* v. *Pennsylvania* (1888) 125 U. S. 181; for example, the interstate commerce clause. 7 COLUMBIA LAW REVIEW 529. Since the only property taken is the right to do business, granted by a license in its nature revocable, there is no taking of property without due process. See contra, a dictum of Brewer, J., in *Chicago etc. Ry. Co.* v. *Dey* (1888) 35 Fed. 866, 880. If the state has contracted with the corporation, however, revocation would impair the obligation of the contract. Whether the state has so contracted depends upon the intent of the statute. *Wisconsin etc. Ry.* v. *Powers* (1903) 191 U. S. 379. The severity of construction varies, it would seem, according as the privilege claimed is important to the existence of sovereignty. Cf. (Police power) *Stanislaus County* v. *San Joaquin etc. Co.* (1904) 192 U. S. 201; 8 COLUMBIA LAW REVIEW 39; (Taxation) *Home of the Friendless* v. *Rouse* (1869) 8 Wall. 430; *New York etc. Ry.* v. *Penn.* (1894) 153 U. S. 628; *American Smelting etc. Co.* v. *Colo.* (1907) 204 U. S. 103. Benefit to the community, *Home of the Friendless* v. *Rouse, supra*, special public necessity, *Powers* v. *Detroit etc. Ry. Co.* (1906) 201 U. S. 543, or large investments by the corporation necessarily contemplated by the legislature, *American etc. Co.* v. *Colo., supra*, may indicate an intention to contract. The existence of these elements and the unimportance to the existence of sovereignty of the right to exclude a foreign corporation may well warrant the conclusion reached in the principal case.

INSURANCE—MUTUAL BENEFIT ASSOCIATION—AMENDMENT OF BY-LAWS.—The certificate of incorporation of a mutual benefit association provided for such sick benefits as the by-laws might from time to time prescribe, and the by-laws called for payments for the entire period of sickness. After the plaintiff fell ill the by-laws were amended reducing the amount of benefits. *Held*, the amendment was valid. *Lewin* v. *The Koerner Benevolent Ass'n* (1908) 109 N. Y. Supp. 101. See NOTES, p. 494.

INSURANCE—NUISANCE—INSURABLE INTEREST.—The defendant insured the plaintiff's frame house, which was built after the passage of an ordinance forbidding such erections. The destruction of the house had been decreed, but before demolition it burned. *Held*, the plaintiff, having an insurable interest, could recover. *Irwin* v. *Ins. Co.* (1908) 109 N. Y. Supp. 612.

In prohibiting the unlawful use of property, and ordering its destruction, the State intervenes, not to punish the individual, but to protect the public. 5 COLUMBIA LAW REVIEW 314. Such intervention, based on the police power, is justifiable only when, because of its nature or use, the property is detrimental to public interests. A substantial frame house in a closely settled district cannot, unless its erection was forbidden by law, be removed,

being neither imminently dangerous nor unlawful *per se*. Freund, Pol. Power, § 528; Wood, Nuisances (2nd Ed.) § 746; *Duncan* v. *Hayes* (1871) 22 N. J. Eq. 25, 30. By statute, however, the future erection of such structures may be prohibited. *King* v. *Davenport* (1881) 98 Ill. 305; *Klingler* v. *Bickel* (1887) 117 Pa. St. 326. The house, in the principal case, having been erected contrary to law, the order to remove it was valid, *Hine* v. *New Haven* (1873) 40 Conn. 478, but it remained, it is submitted, the plaintiff's property, see *People* v. *Assessors* (1883) 93 N. Y. 308, 312, and after demolition she would have been entitled to the materials. *Eichenlaub* v. *St. Joseph* (1892) 113 Mo. 395, 406. The holding that the plaintiff had an insurable interest, therefore, seems correct, apart from public property. But, on grounds of public policy, recovery should have been denied, the status of the house, erected in defiance of law, being illegal *ab initio*, Freund, Pol. Power, § 528, thus bringing the case within the rule that a contract of insurance is void if its result would be to encourage acts in violation of law. *Johnson* v. *Ins. Co.* (1879) 127 Mass. 555; *Carrigan* v. *Ins. Co.* (1881) 53 Vt. 418, 423.

INTERSTATE COMMERCE—REGULATION—STATUTE LIMITING LIABILITY.—A statute prohibited a telegraph company from limiting its liability. The plaintiff sued for negligence occurring without the state in the transmission of a message. *Held*, by an equally divided court, the statute was not an interference with interstate commerce. *Commercial Milling Co.* v. *Western Union* (Mich. 1908) 115 N. W. 698.

The line determining the validity of a state statute which affects interstate commerce is impossible of exact determination. Cooley, Const. Lim. 856. Thus, while an act requiring the separation of white and black races on interstate carriers was declared unconstitutional, an act forbidding such separation was upheld. *Hall* v. *McCuir* (1877) 95 U. S. 485; *Louisville Ry. Co.* v. *Mississippi* (1889) 133 U. S. 587. Though statutes forbidding the limitation of liability by interstate carriers have been upheld, such cases are distinguishable from the principal case. *Chicago etc. Ry. Co.* v. *Solan* (1899) 169 U. S. 133. In the case at bar the statute is unconstitutional if within the state it puts a burden on interstate commerce, *Central etc. Ry. Co.* v. *Murphey* (1905) 196 U. S. 194, or affects the carrier's conduct beyond state limits. *Western Union* v. *Pendleton* (1886) 122 U. S. 347. The extraterritorial effect need not result from a duty directly imposed by the statute, but it would seem unconstitutional if the natural effect of the act is to cause a change of conduct beyond the state. *Hall* v. *McCuir, supra; Bowman* v. *Ry. Co.* (1888) 125 U. S. 465. Even though the statute under consideration does not in terms impose a new duty, its necessary result, it seems, is to affect the carrier beyond the state by making him more careful in attempting to protect himself from loss under the increased liability. This statute does not compel the carrier to use a greater degree of care, and the Supreme Court has given no indication whether an effect beyond the state due only to the carrier's gratuitous efforts to lessen liability and thus alleviate the operation of the law will render the statute unconstitutional.

MORTGAGES—LAWFUL POSSESSION BY MORTGAGEE AFTER DEFAULT IN NEW YORK.—The defendant, who was tenant of a life tenant, either shortly before or immediately after the death of his lessor acquired an overdue mortgage to the premises. In an action of ejectment the defendant sought to defend his possession as mortgagee against the remainderman. *Held*, the plaintiff could recover. *Barson* v. *Mulligan* (N. Y. 1908) 84 N. E. 75. See NOTES, p. 486.

MUNICIPAL CORPORATION—LOCAL SELF-GOVERNMENT—FIRE DEPARTMENT.—A statute provided for the management of a municipal fire department by appointees of the governor. *Held*, the act was invalid as infringing the right of local self-government. *Davidson* v. *Hine* (Mich. 1908) 115 N. W. 246.

Some jurisdictions hold that, in the absence of constitutional guarantees, municipalities are under the complete control of the legislature; *Commonwealth* v. *Plaisted* (1889) 148 Mass. 375; *Redell* v. *Moores* (1901) 63 Neb. 219, overruling *State* v. *Moores* (1898) 55 Neb. 480; others maintain, with the principal case, that they have an inherent right of self-government. *People* v. *Hurlbut* (1871) 24 Mich. 44; *People* v. *Albertson* (1873) 55 N. Y. 50, 57. The conflict may be explained by the varying history and political development of the states. 14 Harv. L. Rev. 20, 25. But even in jurisdictions agreeing with the case under discussion, the distinction between officers whose duties concern the state at large and those whose functions are exclusively local is recognized. 1 Dillon, Mun. Corps. (4th Ed.) § 58; *People* v. *Mahaney* (1865) 13 Mich. 481. Thus, police and health commissioners, as agents of the state, may be appointed by the governor or legislature, *Newport* v. *Horton* (1900) 22 R. I. 196; *Davock* v. *Moore* (1895) 105 Mich. 120, but officers in charge of parks, sewers or water works can be chosen only by the municipality. *People* v. *Detroit* (1873) 28 Mich. 228; and see *Burch* v. *Hardwicke* (Va. 1878) 30 Gratt. 24, 35. The fire department involving the protection of the public's life and health as well as its property and the corporation as such having no peculiar interest therein, 2 Dillon, Mun. Corps. (4th Ed.) § 976, the reasons warranting legislative control over the police would seem equally applicable to fire departments. *Redell* v. *Moores, supra,* but see *State* v. *Denny* (1888) 118 Ind. 382, 396. The distinction in the principal case is not convincing.

Municipal Corporations—Recovery of Money Paid Under Mistake of Law.—The county commissioners under mistake of law paid the defendant, a sheriff, in excess of his lawful compensation. *Held*, the county could recover the excess. *Free Holders* v. *Kaiser* (N. J. 1908) 69 Atl. 25.

It is the rule as between individuals that money voluntarily paid under a mistake of law cannot be recovered. 7 Columbia Law Review 279. Municipal corporations are not held strictly to this rule. *Barnes* v. *Dist. of Col.* (1887) 22 Ct. of Cl. 366; *Wis. Ry. Co.* v. *U. S.* (1896) 164 U. S. 190. Thus, on the grounds of public policy, recovery is allowed where the payment is either illegal, *Village of Ft. Edward* v. *Fish* (1898) 156 N. Y. 363; *Heath* v. *Albrook* (1904) 123 Ia. 559, or the public officer in making the payment acted beyond the scope of his authority, *Camden* v. *Varney* (1899) 63 N. J. L. 325, or the recipient was himself an officer of the corporation. *Allegheny County* v. *Grier* (1897) 179 Pa. 639. When, however, none of these elements is present, it is suggested that, since the prevention of unlimited litigation is the basis for the refusal to grant relief for mistake of law, 7 Columbia Law Review 279, 280, municipal corporations should not be exempted from the rule, *County* v. *Rundall* (1880) 43 Mich. 137, and the cases based upon the broad ground that the act of the agent does not bind the principal, *Ellis* v. *Board of Auditors* (1895) 107 Mich. 528, 536, seem unsound. 5 Columbia Law Review 373; *Village* v. *Knopf* (1902) 199 Ill. 444; *Supervisor* v. *Briggs* (N. Y. 1846) 2 Denio 226. Since in the principal case a statute limited the defendant's compensation, a further payment was illegal and a recovery was correctly allowed. *Comm.* v. *Heaston* (1895) 144 Ind. 583.

Negotiable Instruments—Refusal to Return Check—Acceptance.—A drawee bank neglected to return checks to the collecting bank within twenty-four hours after delivery. *Held*, retention, though non-tortious, was sufficient to charge the drawee as acceptor under § 225 [137] of the Neg. Inst. Law. *Wisner* v. *Bank* (Pa. 1908) 68 Atl. Rep. 955.

By the custom of merchants, the drawee is entitled to a reasonable time, usually twenty-four hours, *Bank* v. *Bank* (1871) L. R. 3 P. C. 526, 542; 1 Daniel, Neg. Inst. (5th Ed.) § 492; see Neg. Inst. Law § 224 [136] in which to accept, at the expiration of which the holder is entitled to a return of the bill. *Westberg* v. *Chicago etc. Co.* (1903) 117 Wis. 589. In the absence of

customary dealing, *Hall* v. *Steel* (1873) 68 Ill. 231; *Dunavan* v. *Flynn* (1875) 118 Mass. 537, or a notification, *Harvey* v. *Martin* (1807) 1 Camp. 425; and see *Bank* v. *Boettcher* (1879) 5 Col. 185, casting upon the drawee the duty to return, the holder must call upon the latter, *Overman* v. *Bank* (1864) 31 N. J. L. 563; 1 Daniel, Neg. Inst. § 499a, and mere retention cannot be construed as acceptance. *Jeune* v. *Ward* (1818) 1 B. & A. 654. But retention by the drawee, if it is his duty to return, will bar his denying liability. *Westberg* v. *Chicago etc. Co., supra.* By the Neg. Inst. Law, all acceptances must be in writing, § 220 [132], but a drawee is liable as acceptor if he destroys the bill, or "refuses" within twenty-four hours after delivery to return it. § 225 [137]. Mere retention is clearly not refusal when it is the holder's duty to demand its return. § 225, Neg. Inst. Law has been construed as requiring a tortious refusal, *Matteson* v. *Moulton* (1880) 79 N. Y. 627, affg. 11 Hun 268; *Dickinson* v. *Marsh* (1894) 57 Mo. App. 566; *Ry. Co.* v. *James* (Ark. 1906) 95 S. W. 804, but retention in the face of a customary dealing or notification that the drawee shall return a bill, or check, § 321 [185], would seem to be a refusal within the meaning of the section. Since banking usage requires prompt return of the check if payment is refused, its retention in the principal case should be sufficient to charge the drawee as acceptor. But, while correct in result, the decision seems erroneous in holding that a non-tortious refusal will so charge the drawee.

PARTNERSHIP—EVIDENCE—ADMISSIONS OF A PARTNER AFTER DISSOLUTION OF THE FIRM.—A and B, partners, engaged the plaintiff to do certain work, before the completion of which the firm was by agreement dissolved. Subsequently the plaintiff and A, in the absence of B, made a settlement for work done under the contract since the dissolution, finding a certain sum due. In an action against A and B (later abated as to A), after the original contract had been proved, it was sought to introduce A's acknowledgment of the amount owing. *Held,* inadmissible. *Burdett* v. *Greer* (W. Va. 1908) 60 S. E. 497. See NOTES, p. 481.

PARTNERSHIP—SURVIVING PARTNER—RIGHTS OF DECEASED PARTNER'S PERSONAL REPRESENTATIVE.—Plaintiff, as administratrix of a deceased partner, sought to enjoin the surviving partner (*pendente lite*) from withdrawing a certain firm bank deposit, on the ground that it was the only property within the state from which a later judgment on accounting might be collected. *Held,* injunction denied. *Wilson* v. *International Bank & Cooper* (App. Div. 1908) 39 N. Y. Law Jour. No. 26.

Since partnerships are based on the closest mutual personal confidence, *Pearse* v. *Chamberlain* (1750) 2 Ves. Sr. 33; Lindley, Partn. (7th Ed.) 396, the various powers of members during the winding-up period, see Burdick, Partn. (2nd Ed.) 237 *et seq.*, are denied the personal representative of a deceased partner. For example, payment to him does not discharge a debt due to the firm. *Wallace* v. *Fitzsimmons* (Pa. 1788) 1 Dall. 248; cf. *Shields* v. *Fuller* (1855) 4 Wis. 102. Until final settlement of affairs the legal title to the firm personally vests exclusively in the surviving partner or partners, *Knox* v. *Gye* (1871) L. R. 5 Eng. & Ir. App. Cas. 656; *Daby* v. *Ericsson* (1871) 45 N. Y. 786, and the possessory actions will lie against the deceased partner's personal representative. *Murray* v. *Mumford* (N. Y. 1826) 6 Cowen 441; *Smith* v. *Wood* (1869) 31 Md. 293. The latter's interest in such assets is merely a right to receive an ultimate distributive share; the surviving partner's control for the purpose of winding up the dissolved firm will be disturbed only in case of laches, *Miller* v. *Jones* (1865) 39 Ill. 54, bad faith, *Jennings* v. *Chandler* (1859) 10 Wis. 21, or otherwise improper conduct. *Gable* v. *Williams* (1882) 59 Md. 46. Nothing short of intent to defraud, therefore, would seem to justify the injunction sought in the principal case. In view of a surviving partner's extraordinary powers, *Williams* v. *Whedon* (1888) 109 N. Y. 333, mere

inconvenience to decedent's administratrix cannot warrant interference with the former's disposition of the partnership property.

PERSONAL PROPERTY—MARGINAL TRANSACTIONS—RELATION OF STOCKBROKER AND CUSTOMER.—Securities bought for a speculator on "margin," under an agreement permitting the broker to pledge the securities carried in his general loans, were redeemed by the broker and delivered to the customer, on receipt of the balance of their account. On a suit by the broker's subsequent trustee in bankruptcy to recover the alleged resultant preference, *Held,* in the absence of any relationship of debtor and creditor between customer and broker, a preference was impossible. *Richardson* v. *Shaw* (1908) 28 Sup. Ct. 512. See NOTES, p. 488.

PLEADING AND PRACTICE—INJUNCTION AND DAMAGES—JOINDER OF PARTIES AND CAUSES.—Several riparian owners sued to restrain the defendants from maintaining bridges, which caused the flooding of the plaintiffs' lands, and asked damages for past injuries. *Held,* the complaint was bad for misjoinder of causes of action. *Burghen* v. *Erie R. Co.* (1908) 108 N. Y. Supp. 311.

A plaintiff may join as defendants several parties whose combined acts cause the nuisance even though they do not act jointly. See 7 COLUMBIA LAW REVIEW 57. As the power to allow joinder of parties plaintiff is in the sound discretion of the court, *Rowbotham* v. *Jones* (1890) 47 N. J. Eq. 337, it is permissible to join those whom a grievance, having one source and operating in the same general manner, affects in agreeing and equivalent rights, *Murray* v. *Hay* (N. Y. 1845) 1 Barb. Ch. 59; *Codigan* v. *Brown* (1876) 120 Mass. 493; *Robinson* v. *Bangle* (1875) 31 Mich. 290, but not if there is a distinct injury to each, *Marselis* v. *Morris Canal Co.* (N. J. 1830) Sax. 31. In suits for an injunction the court may also grant damages for past injuries, *Warren* v. *Parkhurst* (1906) 186 N. Y. 45; *Winslow* v. *Mayson* (1873) 113 Mass. 411, but each defendant is liable only in proportion to his contribution to the wrong. *Sloggy* v. *Dilworth* (1888) 38 Minn. 179; *Chipman* v. *Palmer* (1879) 77 N. Y. 51. Where, however, several join as plaintiffs in seeking an injunction, they must each be interested in the subject matter and the entire relief, Bliss, Code Pleading, 2nd Ed., § 76, and since a prayer for damages is undoubtedly several, *Braham* v. *Hostetter* (1885) 67 Cal. 222; *Brady* v. *Weekes* (N. Y. 1848) 3 Barb. 157, the principal case is sound in holding that to a petition for injunctive relief a suit for damages cannot be joined.

PLEADING AND PRACTICE—WRIT OF ERROR FROM THE UNITED STATES SUPREME COURT TO A STATE COURT.—The state Supreme Court decided that under the Tennessee statute of 1873 it had no jurisdiction to enjoin an inspector from acting pursuant to a later statute attacked as interfering with interstate commerce. *Held,* Harlan, J., dissenting, the writ of error would lie, since the decision's effect was to sanction a possible interference with interstate commerce. The judgment was affirmed on other grounds, Holmes and Moody, JJ., dissenting. *General Oil Co.* v. *Crain* (1908) 28 Sup. Ct. Rep. 475.

A decision of a State Court may be reviewed, reversed and remanded, or the proper decree rendered by the United States Supreme Court, *Murdock* v. *The City of Memphis* (1874) 20 Wall. 590, where a federal question was decided against the plaintiff in error. *Chouteau* v. *Gibson* (1884) 111 U. S. 200; *Farney* v. *Towle* (1861) 1 Black. 350. But if the decision was placed also upon a ground not involving such a question the court has no jurisdiction. *Hale* v. *Akers* (1889) 132 U. S. 554; *Adams County* v. *Burlington etc. R. R.* (1884) 112 U. S. 123; and see *Johnston* v. *Risk* (1890) 137 U. S. 300. Declarations of local law, as the construction of constitutional state statutes, *Central of Georgia Ry. Co.* v. *Murphey* (1905) 196 U. S. 194, or of city ordinances; *Henderson Bridge Co.* v. *Henderson City* (1891) 141 U. S. 679; or the extent of a court's jurisdiction under the

state constitution, *Callan* v. *Bransford* (1891) 139 U. S. 197, or in equity, *Adsit* v. *Smith* (1872) 16 Wall. 185, or under a state statute, *De Saussaure* v. *Gaillard* (1888) 127 U. S. 216, are not federal questions. Since the constitutionality of the statute of 1873, in the case under consideration, was not attacked, and since the only ground of the State Court's decision was purely local, the assumption of jurisdiction to review must be taken as an extension. Cf. *De Saussaure* v. *Gaillard, supra; Adams Co.* v. *Burlington etc. R. R. Co., supra.*

QUASI-CONTRACTS—ILLEGALITY OF CONTRACT—PAR DELICTUM.—The plaintiff sued for the value of ten months' service rendered to an insurance company under a three-year contract of employment. A statute made it a misdemeanor for an insurance company to make such a contract for any period over twelve months. *Held,* the plaintiff could recover. *Akers* v. *Mutual Life Ins. Co.* (1908) 39 N. Y. Law Jour., No. 24.

Where a contract is *malum in se,* involving moral turpitude or violating some fundamental principle of public policy, relief of any nature is uniformly refused to either party, *Tracy* v. *Talmage* (1856) 14 N. Y. 162, 181, *a fortiori,* the question of *par delictum* is immaterial. Where the contract is merely *malum prohibitum,* no recovery can ordinarily be had if the parties were *in pari delicto;* 7 COLUMBIA LAW REVIEW 416; *Irwin* v. *Curie* (1902) 171 N. Y. 409; but otherwise, if one of the parties is innocent or the more innocent and the other party has been unjustly enriched, in which case an assumpsit implied in law "and founded upon the moral obligation resting upon the defendant" will lie. *Tracy* v. *Talmage, supra; Morville* v. *Amer. Tract Society* (1877) 123 Mass. 129; *Williams* v. *Hedley* (1807) 8 East 378; *Smart* v. *White* (1882) 73 Me. 332. Some jurisdictions even appear to allow a recovery on the express contract. *Irwin* v. *Curie, supra.* It is submitted that this is illogical, since no action is properly maintainable on the unlawful agreement. *White* v. *Franklin Bank* (Mass. 1839) 22 Pick. 181, 184. In the principal case, on any reasonable interpretation, the statutory inhibition extended merely to the insurance company and not to employees contracting with it. N. Y. Laws, 1906, ch. 326, § 98. As the plaintiff, therefore, was not in equal guilt, a recovery in quasi-contract was properly permitted.

REAL PROPERTY—TENANTS IN COMMON—EASEMENTS—PRESCRIPTION.—An easement by prescription was claimed against tenants in common, one of whom was an infant against whom the statutory period had not run. *Held,* the claim to an easement is good against all the adult co-tenants. *Taggart* v. *Manhattan Ry. Co.* (1907) 109 N. Y. Supp. 38.

Similar facts. *Held,* (two judges dissenting) the presumption of a lost grant cannot obtain as against any of the tenants in common. *Goggin* v. *Manhattan Ry. Co.* (1908) 109 N. Y. Supp. 83.

Wherever several persons have a common interest in an estate, or hold as tenants in common, no one of them can create a servitude therein in favor of the others, *Collins* v. *Prentice* (1843) 15 Conn. 423; *Crippen* v. *Morss* (1872) 49 N. Y. 63, or of other estates. *Clark* v. *Parker* (1871) 106 Mass. 554. The grantor of an easement should have the entire interest in the fee. Washburn on Easements (4th Ed.) 46. Otherwise the creation of incumbrances by one co-tenant would prevent such a partition as would give the other tenants in common unincumbered title. *Marshall* v. *Trumbull* (1859) 28 Conn. 183; *Adam* v. *Briggs Iron Co.* (Mass. 1861) 7 Cush. 361. An easement by prescription rests upon the presumption of a lost deed, and the adverse user by the claimant must be of the same character and duration as that required to give title to realty. *Lewis* v. *New York etc. Ry Co.* (1900) 162 N. Y. 202. The effect of infancy upon either adverse possession or prescription is alike. *Scallon* v. *Manhattan Ry. Co.* (1906) 185 N. Y. 359. The adverse claim must be under or through one who had the right to create such an easement by grant, *Rochdale Canal*

Co. v. *Radcliffe* (1852) 18 Q. B. 287, but the presumption arising from enjoyment can always be rebutted by proof that no grant could have been made. *Chalker* v. *Dickinson* (1815) 1 Conn. 382; *Lockwood* v. *Wood* (1844) 6 Q. B. 50. Since an easement is by its very nature indivisible, it would seem that, where one of the co-tenants was under a disability, and could not, in fact, have made a grant, none can be presumed. See *Watkins* v. *Peck* (1843) 13 N. H. 360.

SALES-BARGAIN AND SALE-PART OF A UNIFORM MASS.—Twenty tons of hay, part of a larger mass and designated as within 10,000 cubic feet from the end of a mow, were sold to the plaintiff. *Held,* because of the designation, a sufficient identification to constitute a bargain and sale. *Barber* v. *Andrews* (R. I. 1908) 69 Atl. 1.

A sale of goods is *prima facie* a bargain and sale. But the passing of title is controlled by the parties' intention expressed or as implied from the circumstances. *Callahan* v. *Meyers* (1878) 89 Ill. 566; *Hatch* v. *Oil Co.* (1879) 100 U. S. 124. Where goods are not specified the usual conclusion is that an executory contract was contemplated. *Scudder* v. *Worster* (Mass. 1853) 11 Cush. 573; *Hutchinson* v. *Hunter* (1847) 7 Pa. St. 140. If goods are contracted for as part of a larger mass dissimilar in quality, a separation is ordinarily essential to the passing of title, the presumption being that parties would not intend title to pass until the vendor had appropriated the goods. *Hutchinson* v. *Hunter, supra.* Authorities differ as to the nature of a contract for part of a uniform mass. Some hold that title does not pass until a specific subject matter exists. *Aldridge* v. *Johnson* (1857) 7 E. & B. 885; *Scudder* v. *Worster, supra; Courtright & Co.* v. *Leonard* (1860) 11 Ia. 32. But the weight of authority favors the view that, since the power of selection confers no advantage on either party and appropriation is merely ministerial, a bargain and sale should be presumed. *Kimberly* v. *Patchin* (1859) 19 N. Y. 330; *Hurff* v. *Hires* (1878) 14 N. J. L. 581; *Brownfield* v. *Johnson* (1889) 128 Pa. St. 254; Burdick, Sales § 78. Though the principal case is correct in its result, the statement that unless the specified boundaries of the twenty tons were indicated a different decision would be reached seems erroneous.

TAXATION—EXEMPTIONS—SEPARATE INTERESTS.—By charter the land of the plaintiff was exempted from taxation "as long as said land belong to the university." Later an act was passed taxing the interest of persons holding under leases. *Held,* such interests were not within the exemption. *Jetton* v. *University of the South* (1908) 208 U. S. 489.

Exemptions from taxation are strictly construed, the presumption being that all that was to be given has been granted in express terms. *Douglas Co. Agri. Soc.* v. *Douglas County* (1899) 104 Wis. 429; *Ford* v. *Delta etc. Co.* (1897) 164 U. S. 662. Where the land is owned by one person and the buildings by another, the two may be separately assessed. *People* v. *Assessors* (1883) 93 N. Y. 308, and, though the land itself is exempt, the erections may be taxed as the property of the lessee by contract. *People* v. *C'm'rs.* (1880) 80 N. Y. 573; *Russell* v. *New Haven* (1883) 51 Conn. 259. Where the interest of the lessee has been made a separate estate, independently liable to taxation, and to sale on execution, such interest is considered taxable, notwithstanding the exemption of the fee. *Phil. etc. Ry. Co.* v. *App. Tax Court* (1878) 50 Md. 397; *Zumstein* v. *Coal Co.* (1896) 54 Oh. St. 264. The common law rule is that the landlord, unless otherwise agreed, is liable for all taxes during the term, *McFarlane* v. *Williams* (1883) 107 Ill. 33, and must therefore reimburse the tenant for all payments made to protect the leased property. *Dawson* v. *Linton* (1822) 5 B. & A. 521. Though this may apply only to taxes affecting the reversion, *Phil. etc. Ry. Co.* v. *App. Tax Court, supra,* here the tax is upon the only remunerative use to which the land can be put, *Dougherty* v. *Thompson* (1888) 71 Tex. 192, and like a tax upon rents or income, *Pollock* v. *Trust Co.*

(1895) 157 U. S. 429, since it must surely affect the leasable value of the land, seems in effect against the fee. But in view of the strict construction applied to such statutes the court does not consider the indirect tax upon the fee as within the exemption.

TAXATION—EXPENDITURES OF PUBLIC FUNDS—PRIMARY ELECTIONS.—A statute provided for the expenditure of public funds for ballots and regulation of primary elections. *Held*, Davis J. dissenting, the act was valid since the money was devoted to a public use. *State* v. *Felton* (Oh. 1908) 84 N. E. 85.

A valid appropriation of public funds by taxation must be for a public purpose. 7 COLUMBIA LAW REVIEW 133; *Bank* v. *City of Iola* (1873) 2 Dill. 353. The most satisfactory test, yet presented, of what is a public purpose is that the effect of the expenditure must primarily and not incidentally benefit the public. *Whiting* v. *Ry. Co.* (1870) 25 Wis. 167. Courts disagree in determining when the people are primarily affected, and the cases are widely divergent. Thus, courts have upheld appropriations for exhibits at expositions, *Daggett* v. *Colgan* (1891) 92 Cal. 53, for bounties for killing of coyotes, *Ingram* v. *Colgan* (1895) 106 Cal. 113, for the building of railroads, *Clark* v. *City of Rochester* (N. Y. 1857) 24 Barb. 446; see *Sweet* v. *Hulbert* (N. Y. 1868) 51 Barb. 312, 316; contra, *People* v. *Salem* (1870) 20 Mich. 452, and have held unconstitutional those for the re-building of a city, *Lowell* v. *Boston* (1873) 111 Mass. 454, and for the support of the indigent blind, *Auditor* v. *State* (1906) 75 Oh. St. 114. Although a liberal construction should be adopted, courts fear a tendency toward paternalism. *State* v. *Switzler* (1898) 143 Mo. 287. Expenditures for the proper function of government are universally upheld, Cooley, Taxation, 195, so that since, in the principal case, the public welfare is secured by purity in primary elections and the public is consequently primarily benefited, the decision is sound.

TORTS—INTERFERENCE WITH "CONTRACTUAL RELATIONS"—FRAUD.—The plaintiff sold phonographs to B who agreed not to sell them to retailers without exacting a certain agreement and under no circumstances to anyone on the blacklist. C, a blacklisted retailer, secured some phonographs from B by fraud and some through a fellow retailer without fraud. *Held*, the plaintiff was entitled to damages only for that transaction in which fraud was used, and to an injunction against further similar injuries. *National Phonograph Co.* v. *The Edison-Bell Consolidated Phonograph Co.* (C. A. 1907) 77 L. J. Ch. Div. 218. See NOTES, p. 496.

TORTS—SICKNESS—EXPULSION FROM PREMISES.—The plaintiff while visiting the defendant's janitor was taken sick with a contagious disease. The defendant expelled her. *Held*, the defendant was not liable for the aggravation of her illness. *Tucker* v. *Burt* (Mich. 1908) 115 N. W. 722.

The disability of another will not create a duty unless there is an existing relation between the parties. *Lord* v. *De Witt* (1902) 116 Fed. 713; *Griswold* v. *B. & M. R. R.* (1903) 183 Mass. 434. Thus a master must care for a disabled seaman, *Scarff* v. *Metcalf* (1887) 107 N. Y. 211; and see *Raasch* v. *Elite Laundry* (1906) 98 Minn. 357; *Stager* v. *Troy Laundry Co.* (1901) 38 Ore. 480. Similarly it has been held that a railroad, having, without fault, run over a trespasser, owes him a duty of care, *Whitesides* v. *Southern R. R. Co.* (1901) 128 N. C. 229; but the weight of authority is contra. *Griswold* v. *B. & M. R. R. Co. supra.* However, sickness may increase the degree of care due one party from another. *R. R. Co.* v. *Salzman* (1895) 52 Oh. St. 558; *O'Mara* v. *Hudson River R. R.* (1868) 38 N. Y. 445. While a trespasser or a licensee may be expelled by an occupant, reasonable care in the manner of the expulsion must be used. *Weymire* v. *Wolfe* (1879) 52 Ia. 533. Though the occupant is liable for excessive violence in expelling a trespasser, *Montgomery's case* (1900) 98 Va. 840, he is not liable for the consequences of the necessary force used. *Hannabalson* v. *Sessions*

(1902) 116 Ia. 457. So if the intruder be sick or infirm, the occupant is liable for lack of care in his treatment of the invalid, but not for damages resulting from the necessary consequences of the exercise of his right, see, *McHugh* v. *Schlosser* (1894) 159 Pa. St. 480, the only limitation upon which is that he do not act with wilful disregard of human life. *De Pue* v. *Flateau* (1907) 100 Minn. 299; *Bradshaw* v. *Frazier* (1901) 113 Ia. 579. Since in the principal case reasonable care was used in the expulsion, the result is sound.

TRADE-MARKS AND NAMES—CHARITABLE ORGANIZATIONS—INJUNCTION.—The plaintiff, though primarily a charitable organization, charged a nominal fee to cover operating expenses. The defendant adopted a similar name, but conducted their business for pecuniary advantage. *Held*, the defendant's use of a similar name could be enjoined. *Legal Aid Soc'y* v. *Wage Earners' Legal Aid Ass'n* (1908) 39 N. Y. Law Jour. 332.

Though one has the absolute right to use his name, he may be enjoined from using it as to "palm off his goods as those of another." *Croft* v. *Day* (1843) 7 Beav. 84; *Meneely* v. *Meneely* (1875) 62 N. Y. 427. The gravamen of the action is the fraud upon the plaintiff and the mere deception of the public is not sufficient. *Levy* v. *Walker* (1879) L. R. 10 Ch. 436. When, however, a corporation adopts a name similar to the plaintiff's, *Chas. S. Higgins Co.* v. *Higgins Soap Co.* (1895) 144 N. Y. 462, or the defendant is not using his own name, *Lord Byron* v. *Johnson* (1816) 2 Mer. 29, and the probable result will be the deception of the public, injury to the plaintiff will be presumed. 8 COLUMBIA LAW REVIEW 120; *Massam* v. *Thorley Cattle Food Co.* (1880) L. R. 14 Ch. 748. Protection against unfair competition, it would seem, was originally granted where the parties were trade rivals. The doctrine has been extended to societies formed for moral or social improvement. In such cases, it would seem, that if the benevolent purpose or prestige of such societies was jeopardized an injunction would issue, *Internat. Com. of Y. W. C. A.* v. *Y. W. C. A.* (1901) 194 Ill. 194; see *Col. Dames of Am.* v. *Col. Dames of N. Y.* (N. Y. 1898) 29 Misc. 10; affd. in 173 N. Y. 586, but the names must be so alike that the public would necessarily be deceived. *Lodge, K. of P.* v. *Improved Order K. of P.* (1897) 113 Mich. 133. Since in the principal case the plaintiff's name had acquired a meaning peculiar to itself, the defendant's adoption of it would necessarily cause the society loss, and the fact that it was not organized for profit should not cause the denial of relief. *Internat. Com. of Y. W. C. A.* v. *Y. W. C. A., supra.*

WILLS—LIMITATIONS OVER—FAILURE OF PRECEDENT ESTATE.—A testatrix devised her estate to her husband for life, at his death one-half to a niece, and, in case the latter should die before the life tenant, then to her children. The niece died after the life tenant, and both of them died before the testatrix. *Held*, the limitation over to the children took effect. *U. S. Trust Co. of New York* v. *Hogencamp* (1908) 191 N. Y. 281. See NOTES, p. 490.

BOOK REVIEWS.

ROBERT W. SKINNER, JR., *Editor-in-Charge.*

LAW: ITS ORIGIN, GROWTH AND FUNCTION, Being a course of lectures prepared for delivery before the Law School of Harvard University. By JAMES COOLIDGE CARTER. New York and London: G. P. Putnam's Sons. 1907. pp. vii, 355.

Although the title of Mr. Carter's book suggests that it is intended as a contribution to historical jurisprudence, and although much of it deals with legal history, it is in reality, as is indicated in the prefatory note, pp. v, vi, and in the opening paragraph of the first lecture, a contribution of legal philosophy. It is an attempt to formulate and to develop a theory regarding the unwritten law. Mr. Carter never made any extensive studies in legal history. Such literature as he commanded is used without discrimination, Montesquieu, Maitland and Guy Carleton Lee (!) being cited as if of equal authority. And he has been led by some of the writers upon whom he relies to make statements which are untrue. His legal philosophy, however, does not rest upon these insecure supports, and his theory of unwritten law is one that contains a large element of truth and deserves respectful consideration.

The Hobbesian theory of law was adopted by Bentham, Mr. Carter points out, because it suited his particular views and purposes, p. 180. This statement may be made of all writers who have propounded philosophic theories of government and of law, including Mr. Carter. In a long and distinguished career at the bar, the public question to which this eminent jurist devoted the most unremitting attention was that of codification. In his consistent opposition to every attempt to codify the common law he was impelled to find a theory which would cause codification to appear not only inexpedient but illegitimate. He might have opposed codification in the United States on political grounds, arguing that in this country national codification is impossible and that state codification would mean the destruction of a body of law which, although nominally state-law, is in reality national. Cf. Monroe Smith, 3 Pol. Sc. Quart. 136 et seq.; W. B. Hornblower, 7 COLUMBIA LAW REVIEW 471 et seq. This line of argument, however, was not only unsatisfactory to Mr. Carter, as based simply on expediency, but also unattractive because he was a state-rights democrat. He found the theory which he needed in the teachings of the historical school, particularly in the emphasis laid by writers of that school upon the derivation of law from custom. To these teachings, however, he was forced, by the exigencies of the codification debate, to give an extension which no other historical jurist has given them. To Mr. Carter, custom is not merely a form of law, coördinate with written law, but in certain broad fields of social relations it is the only real law. In these fields "law * * * *is* custom, and like custom, self-existing and irrepealable." p. 173. These fields are generally described as those of "private" law, occasionally as the

"domain of liberty." They are coincident with the fields still generally occupied in the United States by case law. When legislation "invades" this domain, "it departs from its just province." p. 135. In describing the unwritten or customary law, Mr. Carter frequently uses phrases which are unfamiliar in historical jurisprudence—phrases which suggest the position assumed by writers of the natural-law school. One passage might be taken for a description of natural law written by a Stoic philosopher or by a medieval churchman: the unwritten law, Mr. Carter says, "is self-existent, eternal, absolutely right and just for the purposes of social government, irrepealable and unchangeable. It may justly be called Divine * * *."

Holding, as he does, that custom is law, Mr. Carter is able to defend the orthodox judicial theory that the law laid down in decided cases is never made by the courts but only found by them. Not only is judge-found law originally drawn from custom, but the entire development of case law is controlled by the development of custom. In admitting, as the author does in many passages, that custom changes, that "in most fully civilized nations * * * customs are subject to incessant change, and that the law resting on custom must change in accordance with it," pp. 257, 258, he apparently contradicts his own assertion that the unwritten or customary law is "irrepealable and unchangeable"; but a careful reading of the entire book makes it clear that he means unchangeable by human volition and therefore irrepealable by legislation. The natural-law phraseology is a survival of older modes of thought. Like most Americans of his generation, the author was brought up on natural-law theories; the theory of legal evolution was a later graft on the natural-law stock of ideas, and the old sap flows freely through the alien branches.

In affirming that all the customs recognized by the courts were law before their recognition, Mr. Carter, of course, has to account for the fact that not all customs are law. He does not evade this difficulty. He admits that morals, as well as manners, are matters of custom, and that neither morals nor manners are law. He meets the difficulty by asserting that there is a line of demarcation which the courts do not create but simply recognize. Those customs, and those customs only, are legal which are necessary for the maintenance of equal liberty in social relations. It cannot be said that this line of demarcation is a very clear one. In applying a principle so general, wide differences of opinion must arise; and power to interpret such a principle would seemingly amount to the power which the positivists assert that the judges possess, viz., the power to make law. Again, in asserting that the judge who recognizes a custom as law adds nothing to it, the author overlooks the positivist contention that something very important is added, viz., the quality of enforcibility, and that this is the specific quality of law. Finally, in asserting that all the modifications of judge-found law are merely recognitions of changes in custom, the author admits that "it is the function of the judges to watchfully observe the developing moral thought and (to) catch the indications of improvement in customary conduct"—a function which apparently enables the court to develop rather than to recognize custom. Mr. Carter, however, would say that if they

should mistake the trend of moral thought, the law stated in their decisions would not be law.

Mr. Carter's distinction between public and private law, between the domain of policy and the domain of liberty, is a sound and true one; and if he had confined himself to saying that, in the domain of liberty, the development of law by judicial decisions has marked advantages over the development of law by statutory enactments, his position, in the reviewer's opinion, would have been unassailable. It is to be regretted that in seeking to protect the common law against legislative encroachment he has taken a position which, although it seems stronger, is really far less tenable.

A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA. Adapted for all the States and to the union of Legal and Equitable Remedies under the Reform Procedure. By JOHN NORTON POMEROY. Students' Edition. By JOHN NORTON POMEROY, JR. San Francisco: Bancroft-Whitney Co. 1907. pp. xvi, 1048.

This rather formidable title appears on the back of the cover as "Pomeroy's Equity Jurisprudence: Students' Edition." A work which originally appeared in three volumes and which in its third edition without two supplementary volumes on Equitable Remedies, was in four volumes, now appears for students' use in one volume. It is a novelty in law-book making. Is it worth while? We believe that it is.

But before speaking of the particular volume in question, it will be necessary to say something of the work of which this is an abridgement and this involves a few words as to other treatises on equity. Of the larger works on equity the student who wishes only one will usually be called upon to select from Spence, Story or Pomeroy.

Each of these writers regards his subject from a different point of view. Spence, under the influence of other legal scholars of his day, developed his treatise from an historical standpoint, and confined his discussion to the principles upon which the Court of Chancery exercises its jurisdiction with respect to property. It was published in 1846-1849. Story, in partial discharge of his duties as Dane Professor of Law in Harvard University, published in 1835-36 the first American treatise on equity for a bar which heretofore had depended upon English writings or American editions thereof. Story founded his theory upon the previous English writings and his discussion is enriched by his knowledge of the Civil Law. Pomeroy's first edition appeared 1881-83. It is not without value to note the qualifications of Story and of Pomeroy. The former brought to his task an experience of twenty-five years as a Justice of the United States Supreme Court, and of six years as Dane Professor. During this latter period he had written his Bailments and his Constitutional Law. Pomeroy had had twenty-five years of practice at the bar and ten years as a teacher, five in the Law School of the University of New York and five at Hastings' College of Law in San Francisco. He had written his Municipal Law, Constitutional Law, Code Remedies and Specific Performance of Contracts.

But between the publication by Story and by Pomeroy the American Reformed Procedure, so-called, inaugurated in New York in 1848 had been

widely tested in America and adopted in England. From twenty-five years of practice in New York where the Reformed Procedure originated, Pomeroy was familiar with the good and the bad sides of the system. Moreover, the work of writing his treatise on "Remedies under the Reformed American Procedure," as he then called his Code Remedies, made him familiar with the fundamental conceptions involved in that reform. From his experience at the bar, and as a student of our institutions and as a teacher, he believed he saw a danger to which the system of equity was exposed by its new relation to law under the Reformed Procedure, because of the combining of legal and equitable rights and remedies in the same action and because of the administration of them by the same tribunal. He apprehended that equitable principles and doctrines would gradually be suppressed and disappear, supplanted by the more inflexible and arbitrary rules of the law, until in time equity would cease to be a distinctive branch of jurisprudence. In the preface to his first edition he said: "Every careful observer must admit that in all the States which have adopted the Reformed Procedure there has been to a greater or less degree a weakening, decrease or disregard of equitable principles in the administration of justice. I would not be misunderstood. There has not, of course, been any conscious, intentional abrogation or rejection of equity on the part of the courts. The tendency, however, has plainly and steadily been towards the giving an undue prominence and superiority to purely legal rules and the ignoring, forgetting, or rejection of equitable notions. In short, the principles, doctrines and rules of equity are certainly disappearing from the municipal law of a large number of the States, and this deterioration will go on until it is checked either by a legislative enactment or by a general revival of the study of equity throughout the ranks of the profession."

Actuated in part by this apprehension and in part by the desire so to present the reasonableness and adaptability of the great underlying principles of equity to the new American practice as to check this decadence, Mr. Pomeroy wrote his treatise. Seemingly, under the influence of Austin, he reconstructed the whole fabric and tried to expound it with reference to American problems. How well he did his work it is not necessary here to enlarge. It is enough to observe its repeated citation with respect by all our courts. Whether right or wrong in his apprehension, he set forth the principles of equity as laid down in the English Court of Chancery in a style that is dignified, clear and simple; and explained and applied them under the varied decisions arising under the complex conditions of our American national life. Whether we agree or disagree with his conclusion we have no difficulty in knowing what he thought was the law. His discussion is helpful. And after all, as has been lately said of another book, "an intelligent discussion is worth more than a correct conclusion." By this we would not imply that Pomeroy's conclusions are not usually correct. But with this motive he was led to write a better book than he probably would have written under ordinary conditions and one of real originality and great value.

Of this work so produced the present volume includes about one-third. Only a small part of the notes are included. No part of the text has

been rewritten. The sacrifice of text is supplemented by an elaborate system of cross-references. The abridging has been done with intelligence. The notes are brief and show good judgment. The cases cited are the leading ones and include practically all those found in the case books on Equity and its leading sub-topics in use in our Law Schools. The references are to the various reports, official and unofficial, where the cases may be found, and this completeness of reference will prove of material aid in the study of any important case. The table of cases is to be highly recommended for including the same duplicate references.

It will prove a valuable book for the student in or out of the schools, and especially for the latter class, will it supplement the study of cases to great advantage. On the whole it fulfills the requirement adopted by its author that a treatise for the American student "must recognize the existing condition both of law and equity, the limitations upon the chancery jurisdiction resulting from varying statutes, and the alterations made by American legislation, institutions and social habits."

FEDERAL USURPATION. By FRANKLIN PIERCE. New York: D. Appleton & Company. 1908. pp. xx, 437.

This is a valuable contribution to current political discussion and deserves wide attention.

There is a tendency to judge public men and measures by their ability to produce whatever at the moment seems a desirable result. Mr. Pierce shows that this is not the final standard of public service and that, as applied in a given instance, it is often entirely misleading. A better test of public service is in the permanent effect upon government. Does a particular course make law more or less respected and its administration more or less certain and uniform? If less, government has been weakened, and effectual remedy for wrong conditions made more difficult. Civilization cannot exist without law. The higher the civilization the more complex the law and the more learning and patience required in governmental administration. Mr. Pierce well says: "The citizens who are contented to rely upon a paternal government can never rise through one emancipation after another into a higher liberty. Social evolution progresses actually with the importance of the citizen above the state, and decreases exactly in proportion of the importance of the state over the citizen. A good despotism is an absolutely false idea."

Now, notwithstanding the controlling purpose of the Constitution to exclude this false idea forever from American politics, the banishment has not been long. New generations have come forward familiar with Continental methods of administration, eager for practical results and unaccustomed to such a "frequent recurrence to the principles of the Constitution" as is necessary "to preserve the advantages of liberty and to maintain a free government." It is the striking contradiction of American politics that we have a Constitution formed to protect and perpetuate local government in the States, administered under a public opinion which, in recent years, seems more and more to demand centralization.

What is the remedy for this condition? Few advocate repeal of the Constitution, though Mr. Pierce quotes some remarkable expressions to show that the view is not without support.

One remedy—if it be results that are wanted—would be to accomplish the desired results under the government we have. There is no real effort made in this direction, but the course is easily possible. It would not produce uniformity of regulation; but uniformity is the badge of centralized power, the lure of the absolutely false idea which should have been banished forever from a free continent. Those who think its convenience sufficient to make its adoption on the whole desirable may find much enlightenment in Mr. Pierce's discussions and in the recent work of Mr. F. J. Stimson, "The American Constitution." See 8 COLUMBIA LAW REVIEW 420.

Another remedy would be to take the view now often expressed that every government has every power which in fact it can exercise. President Roosevelt said in his Harrisburg speech in 1906 that Federal power should be increased "through executive action * * * and through judicial interpretation and construction of law." This is "Federal usurpation," and Mr. Pierce's book is a commentary upon that doctrine, taking up the history of Federal administration in executive, legislative and judicial branches of government. No more important subject can be presented for public consideration. The question is not whether government has been administered for purposes in themselves meritorious. "It is just because such powers are exercised for good purposes that they become dangerous to the public welfare." When the people are accustomed to the subversion of law, the security that government will seek good purposes is gone. Daniel Webster said that "It is hardly too much to say that the Constitution was made to guard against the dangers of good intentions, real or pretended. When bad intentions are boldly avowed people will promptly take care of themselves." The history of Federal administration which is reviewed should be considered, not from a commercial or economic standpoint, but with "frequent recurrence to the principles of the Constitution." Two great purposes are to be sought,—political liberty and economic liberty,—and as each is necessary to the other, both must be sought at once. This is the two-fold problem which presses for solution, and no success can be permanent, however popular, which disregards either aspect.

In his economic views Mr. Pierce is by no means reactionary. "Existing conditions," he says, are exactly those "which have preceded a change from democracy to empire and despotism ever since the world began. The building up of great fortunes; the growth of a moneyed aristocracy; the passing of wealth into the hands of the few; the separation of the people into classes; the establishment of monopolies * * *; the universal desire for national grandeur and glory, together with the spirit of restlessness in our people—these are dangerous omens"; and the conditions described demand prompt remedy, but he adds, "the patriotism which will accomplish results to-day must come from careful study of our institutions." The world has not so changed that past experience has become worthless. "To suppose," President Jackson said, "that because our government has been instituted for the benefit of the people, it must

therefore have the power to do whatever may seem to conduce to the public good, is an error into which even honest minds are too apt to fall,"—a dangerous error according to President Washington, for "the spirit of encroachment tends * * * to create, whatever the form of government, a real despotism."

LABOR LAWS AND DECISIONS OF THE STATE OF NEW YORK. STATUTES COMPILED AND CASES SUMMARIZED. By JOHN A. CIPPERLY. Revised Edition. Albany: Banks & Co. 1908. pp. xxiv, 462.

This compilation of statutes and decisions is very interesting for two reasons. First, it shows a rapid increase in labor legislation during the last decade. Second, it discloses the great difficulties which beset the lawyer, who wishes to know the present state of the New York statutes on this topic.

Dealing with the second point first, it can be said with confidence that this volume will be found very useful to the profession. Within its moderate limits all of the existing statutes of this state, relating to laborers, are brought together under a classification, which enables the busy lawyer quickly to ascertain the rule upon a given point—or, at least to read the deliverance of the Legislature upon that point. True, that deliverance may be unconstitutional; or it may be so unhappily expressed as to be subject to a construction which does not occur to him upon reading it; but all that the Legislature has said upon the subject, in original act and in repealing and modifying statutes, is presented to him here, in a compact and fairly well arranged form. He does not have to examine a score of volumes of session laws in order to ascertain the present language of a particular statutory provision.

Moreover, he can find within this handy volume either a digest, or a full reprint of every judicial decision rendered under any of these statutory clauses, whether by the New York, or by the Federal courts. For example, the prevailing opinion in *Lochner* v. *State of New York* (1905), 198 U. S. 45 (see 5 COLUMBIA LAW REVIEW 462), reversing 177 N. Y. 145 and 73 App. Div. 120, is reprinted at pages 367-383. In this case the Supreme Court of the United States held unconstitutional § 110 of the Labor Law of 1897, which prohibited an employee from working "in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day." Such prohibition was held to be an unwarranted interference with the freedom of contract between employer and employee. The decisions are brought down to March 1st, 1908, and include those declaring unconstitutional the Federal Employers' Liability Law of 1906, and sustaining the complaint in the *Danbury Hat Case.*

This is not the place for a discussion of the wisdom or the folly of modern labor legislation, but no one can examine the present compilation without astonishment at the changes which have been wrought in the common law already, and at the increasing demand for new statutes. Each new labor law breeds almost annual amendments, and, indeed, this species of legislation seems not unlike Iago's conception of jealousy, making "the meat it feeds on."

It is true, that the New York labor statutes bulk much larger, when reprinted as in this volume, in the detached and scrappy form of their original enactment, than when condensed, as they have been by the Board of Statutory Consolidation. In the report of that Board they take up but sixty-eight pages; while in the volume before us they fill more than four times that space. Let us hope that the report of this Board may be adopted by the next Legislature.

MANUAL OF CORPORATE TAXATION IN NEW YORK. By HENRY M. POWELL. New York: Fallon Law Book Co. 1907. pp. xiii, 119.

The nature of this volume is best indicated by a few lines in the preface where it is stated that "a special effort has been made to have this little book printed and published so that it may be available to the profession before the time expires to file the Annual State Tax Reports." It is distinctly a handbook, not a treatise. It is prompted in the main by the 1906 and 1907 Amendments of the Franchise Tax Law, though it is not limited to a treatment of that law, but covers our statutes of taxation generally in so far as they relate to the taxation of corporations for state purposes. After a brief review, hardly more than an outline, of the history and system of taxing stock corporations for state purposes, the several corporation tax laws are quoted each *in extenso*, and brief paragraphic explanations are given of their terms. These notes—for the comments upon the laws is hardly more than a series of notes, and perhaps could not well have been much more—are not always arranged with as much system as might be desired, though they contain numerous useful hints. The method employed to explain the rather intricate Franchise Tax Law by hypothetical illustration is as helpful as it is unusual. The book does not cite many cases, but this is no fault of the author, as the amended law had not been judicially interpreted at the time of the book's preparation. The practice of the Comptroller's Office has been given, and a number of serviceable forms conclude the book.

REVIEWS TO FOLLOW:

THE JOURNAL OF THE CONSTITUTIONAL CONVENTION OF 1787. By JAMES MADISON. Edited by GAILLARD HUNT. New York: G. P. Putnam's Sons. 1908. 2 Vols. pp. xix, 392; vii, 461.

THE LAW OF THE FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES. By FREDERIC J. STIMSON. Boston: The Boston Book Co. 1908. pp. xxii, 386.

FUNERALI. By PROF. MARIO RICCA-BARBERIS. Milan: *Societa Editrice Libraria*. 1906. pp. xxiii, 204.

THE INCORPORATION AND ORGANIZATION OF CORPORATIONS. 3rd Ed. By THOMAS GOLD FROST. Boston: Little, Brown & Co. 1908. pp. xv, 908.

THE CORPORATION MANUAL. 15th Annual Ed. 1907-08. Edited by JOHN S. PARKER. New York: Corporation Manual Co. 1908. pp. xiii, 1816.

MARKETABLE TITLE TO REAL ESTATE, Being also a Treatise on the Rights and Remedies of Vendors and Purchasers of Defective Titles (As Between Themselves). Second Edition. By CHAPMAN W. MAUPIN. New York: Baker, Voorhis & Co. 1907. pp. lxxvi, 910.

COLUMBIA LAW REVIEW.

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THE THEORY OF A PLEADING.

In these days of codes, of the abolition of forms and fictions in pleading, and of easy and cheap amendments, one may perhaps be expected to apologize for wasting printers' ink and readers' time on a point of pleading. But pleading is not yet simplified out of existence. A glance at the notes of Judge Bogle in the fourth edition of Pomeroy's Code Remedies reveals what a stream of modern decisions there is. The so-called common law states are no less prolific. Almost every late volume of the decisions of the Supreme Court of Illinois contains a dozen or more cases involving questions of pleading. The space given to pleading in the Encyclopedias and the local text-books on the subject indicates that the profession is willing to pay for real information about modern pleading, despite the fact that the last edition of Chitty was published in 1876. Nor is it probable that the law of pleading will ultimately become obsolete. The need that each party should be notified before trial of the positions of the other party, so that evidence to combat these positions may be gathered, will no doubt always be satisfied by some sort of pleadings. Their form will probably be still further simplified. Our codes are not the last words on the subject. But pleadings will remain. We may then, even yet, be serious about a point of pleading.

"It is an established rule of pleading that a complaint must proceed upon some definite theory, and on that theory the plaintiff must succeed, or not succeed at all. A complaint cannot be made elastic so as to take form with the varying views of counsel."[1]

Is this so? And first, What does it mean? To answer this latter question some discriminations are necessary.

Questions concerning the limits of amendment are to be distinguished. Our problem is, whether, the pleading being drawn

[1]Quotation from Mescall *v.* Tully (1883) 91 Ind. 96, 99, found in Oölitic Stone Co. *v.* Ridge (Ind. 1908) 83 N. E. 246, 7.

on one theory, the party may win by proving a right to succeed on another theory and without amending his pleading so as to make it conform to his new theory. The question whether he could change his theory by amendment is obviously a different one. It is a part of the much mooted question of when an amendment introduces a new cause of action, a question too complicated to be touched upon in this paper.

Suppose the new theory upon which counsel relies requires the proof of facts not alleged. Plainly he will fail. The fundamental proposition that one cannot prove facts not alleged is true whether we are dealing with common law pleading,[2] equity pleading,[3] or code pleading.[4] It is simply a case of variance between the allegations and the proof. Our problem, then, only arises when there are sufficient facts in the pleading to sustain the new theory and when they were not alleged to make out this new theory but merely in aid of the real theory of the pleading.

Again we must remember that under the common law system it was impossible to bring an action in one form of action and then to recover on proof of facts sufficient to maintain another form of action.[5] The application of this prohibition by a Court is therefore hardly to be considered as a decision bearing upon our present question No doubt the origin of this rule is to be found in historical accident. The forms of action grew up separately. Later, when pressed for a reason to sustain a rule so severe, the judges stated that "It is of importance that the boundaries between the different actions should be preserved, * * *" and called attention to minor differences as to pleas, costs, and the effect of judgments.[6] These minor differences could easily have been prevented from causing any injustice. Quite commonly one can amend into

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[2]Horsefall *v.* Testar (Eng. 1817) 7 Taun. 385; Blanchard *v.* Co. (1888) 126 Ill. 416; Dewey *v.* Williams (1861) 43 N. H. 384; Shechy *v.* Mandeville (U. S. 1812) 7 Cranch 208; Woodstock Bank *v.* Downer (1854) 27 Vt. 482.

[3]Ferraby *v.* Hobson (Eng. 1847) 2 Phil. Ch. 255, 8; Gage *v.* Curtis (1887) 122 Ill. 520; Scudder *v.* Young (1845) 25 Me. 153; Rigg *v.* Hancock (1882) 36 N. J. Eq. 42; Pacific R. R. *v.* Ketchum (1879) 101 U. S. 289, 297.

[4]Carpentier *v.* Brenham (1875) 50 Cal. 549; Lumbert & Co. *v.* Palmer (1870) 29 Ia. 104; Cole *v.* Armour (1900) 154 Mo. 333, 51; Stevens *v.* City (1881) 84 N. Y. 296, 305; Willis *v.* Branch (1886) 94 N. C. 142, 7.

[5]Reynolds *v.* Clerk (1725) 8 Mod. 272; Savignac *v.* Roome (1794) 6 D. & E. 125; Creel *v.* Kirkham (1868) 47 Ill. 344, 9; Mulvey *v.* Staab (1887) 4 N. Mex. 172; Vail *v.* Lewis (1809) 4 Johns. 450, 8; Hughes *v.* Wheeler (1871) 65 N. C. 418; Berry *v.* Hamill (1824) 12 S. & R. 210; Royce *v.* Oakes (1898) 20 R. I. 418.

[6]Savignac *v.* Roome (1794) 6 D. & E. 125.

a different form of action.[7] It would seem, therefore, that the rule forbidding recovery in a different form of action from that in which the action is brought, must rest to-day on the same reasons as the rule of the Indiana Court, quoted above, forbidding a shifting of the theory of the action. However, the authorities establishing the rule that one cannot depart from his form of action are not further considered in this paper. That rule is to be discriminated from the one we are to discuss. At common law, then, our question could only arise when both theories, that of the pleading and that to which counsel wishes to change, are within the same form of action.

In equity pleading there does not seem to have been a classification of suits analagous to the forms of action at common law. It is true that bills were divided into well-known groups: original bills, supplemental bills, bills of revivor, and others. But if a bill of one kind was filed and it developed later that its facts and the relief sought required a bill of a different kind, the bill filed would be considered as of the latter class.[8] Therefore, in equity pleading, there is the same chance of the question arising, of following the theory of the pleading, as there is under the codes.

The answers that the Courts have given to the question, whether one must follow the theory of his pleading, have certainly been far from harmonious. In England a leading case was *Charnley* v. *Winstanley*.[9] The plaintiff sued for the breach of an arbitration agreement, relying for recovery on the fact that the defendant had not performed the award. In the declaration it was alleged that the defendant had married before the award was made. It was held that this destroyed the breach on which the plaintiff relied since it invalidated the award by revoking the power of the arbitrators. But it was also held that such revocation itself, being a breach of the agreement to refer and not to revoke, was a sufficient breach and that the plaintiff could recover on that. Evidently the

[7]Billing *v.* Flight (Eng. 1815) 2 Marsh. 124; May *v.* Gesellschaft (1904) 211 Ill. 310; Stebbins *v.* Co. (1879) 59 N. H. 143; Smith *v.* Savin (1894) 141 N. Y. 315; Chapman *v.* Barney (1889) 129 U. S. 677.

[8]*Ex parte* Smith (1859) 34 Ala. 455, 7; Sayre *v.* Co. (1882) 73 Ala. 85, 97; Curry *v.* Peebles (1887) 83 Ala. 225; McConnell *v.* Gibson (1850) 12 Ill. 128, 30; Carneal *v.* Wilson (Ky. 1823) 3 Litt. 80, 90; Ridgely *v.* Bond (1862) 18 Md. 433, 50; Northman *v.* Co. (1873) 1 Tenn. Ch. 312; Arnold *v.* Moyers (Tenn. 1878) 1 Lea 308, 15; Shainwald *v.* Lewis (1805) 69 Fed. 487, 495. A pleading filed as a petition may be sustained as a bill. Belknap *v.* Stone (1861) 1 Allen 572; Majors *v.* McNeilly (Tenn. 1872) 7 Heisk. 294; Sayres *v.* Wall (Va. 1875) 26 Gratt. 354, 77. Likewise a bill may be sustained as a petition. Foscue *v.* Lyon (1876) 55 Ala. 440, 56; Miller *v.* Saunders (1855) 18 Ga. 492; Griggs *v.* Co. (1862) 10 Mich. 117, 122.

[9](K. B. 1804) 5 East 266.

plaintiff recovered according to a theory totally different from that on which his declaration was based. The case is directly *contra* to the rule of the Indiana Court quoted above.[10] The argument of the Court was that the breach in revoking the arbitrator's authority by marrying was simply informally alleged, that while this might have been an objection on special demurrer it was clearly not open in arrest of judgment, being a defect in form. This reasoning seems unanswerable unless there is a rule that one must recover according to the theory of his pleading. Apparently no such rule was known to the Court of King's Bench in 1804.[11]

There were later dicta recognizing *Charnley* v. *Winstanley*.[12] But in *Thom* v. *Bigland*[13] the Court of Exchequer rendered a decision really contrary. An action was brought for fraudulent misrepresentations by the defendants, the plaintiff's brokers. The representations concerned their actions as agents of the plaintiff. Baron Parke said[14] that whether the defendants were liable independently of the fraud he would not inquire, since the basis of the declaration was the fraud. No other reasons are given. The idea that one must recover according to the theory of his action seems, however, to be at the bottom of the decision.

These cases were common law cases. Meanwhile British courts of equity had established a rule that if a bill is based on fraud and the proof of fraud fails the plaintiff cannot recover on another theory even though there are sufficient facts stated in the bill.[15] This rule seems to have been based originally on the notion that a charge of fraud is so serious that one ought to make it only at the peril of failing entirely if he does not prove it. In *Glascott* v. *Lang*[16] the Lord Chancellor said:

"* * * where a bill is filed making a case of alleged fraud, and the fraud is disproved or not established, the court will not

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[10]P. 523.

[11]Charnley *v.* Winstanley was based on Le Bret *v.* Papillon (K. B. 1804) 4 East 502. This case held that a plea could be sustained on a different theory from that of the pleader. The arguments were much the same as in Charnley *v.* Winstanley. See also Williamson *v.* Allison (1802) 2 East 446.

[12]Head *v.* Baldrey (K. B. 1837) 6 A. & E. 459; Swinfen *v.* Chelmsford (Exch. 1860) 5 H. & N. 890, 920.

[13](1853) 8 Exch. 724.

[14]Ib. 731.

[15]Ferraby *v.* Hobson (1847) 2 Phil. Ch. 255; Glascott *v.* Lang (1847) 2 Phil. 310, 320-2,—(In this case, the last, and probably others, the allegations independent of fraud were made to anticipate defenses.); Price *v.* Berrington (1850) 3 Macn. & G. 486, 98; Hickson *v.* Lombard (1866) L. R. 1 H. L. 324, 31, 36; London Bank *v.* Lempriére (1873) L. R. 4 P. C. 572, 97.

[16](1847) 2 Phil. 310, 322.

allow such a bill to be used for any secondary purpose; because the door of this court being always open to allegations of fraud, it would be unjust, and much to be deprecated, to afford any encouragement to such allegations by allowing a party to try the experiment of obtaining relief on that ground, and if it failed, to fall back upon his bill for some inferior kind of relief."

In later cases, however, it was held that a charge of fraud might be made and be unproved and yet the plaintiff succeed on other allegations in his bill, if the allegation of fraud was subsidiary and not the foundation of the bill.[17] In *Hickson* v. *Lombard*[18] the reason for the rule is stated. The Lord Chancellor said:[19]

"* * * where a bill alleges matters of fraud, and all the subsequent considerations depend on these matters which are not proved, the court must necessarily dismiss the bill; 'but if fraud be imputed, and other matters alleged which will give the Court jurisdiction as the foundation of a decree, then the proper course is to dismiss so much of the bill as is not proved, and to give so much relief as, under the circumstances, the plaintiff may be entitled to.'"

And Lord Cranworth said:[20]

"* * * I subscribe most readily to the doctrine that, where pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the allegations of the bill facts which might, if not put forward as proofs of fraud, have yet warranted the plaintiff in asking for relief. A defendant, in answering a case founded on fraud, is not bound to do more than answer the case in the mode in which it is put forward. If, indeed, relief is asked alternatively, either on the ground of fraud, or, failing that ground, then on some other equity, a plaintiff may fail on the first but succeed on the latter alternative. But, then, the attention of the defendant has been distinctly directed to it, and he has been called on to answer the case according to both alternatives."

No doubt the result of these cases is that where fraud is the basis of the bill, the theory on which the plaintiff sues, it must be proved or the plaintiff will fail; where, however, fraud is a subsidiary allegation, *i. e.*, alleged to anticipate a defense, or as an alternative ground of recovery, the plaintiff may succeed on his other allegations though the fraud is not established. And the last quotation gives the reason. One must abide by his theory because

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[17]Hickson *v.* Lombard (1866) L. R. 1 H. L. 324, 31, 36; London Bank *v.* Lempriére (1873) L. R. 4 P. C. 572, 97; Hilliard *v.* Eiffe (1874) L. R. 7 H. L. 39, 51-2; Thomson *v.* Eastwood (1877) L. R. 2 A. C. 215, 241, 250.

[18]L. R. 1 H. L. 324.

[19]At p. 331.

[20]At p. 336.

otherwise the defendant may be misled in shaping his defense. All this is simply our Indiana rule applied, however, to but one case, that where the theory of the pleading is fraud. Oddly enough, *Thom* v. *Bigland*[21] was a case where the original theory was fraud. But the equity cases were not referred to in it and the language of the Court is hardly confined to a case of fraud. Quite as oddly a later common law case coming up to the Privy Council from Quebec[22] was a case where the original theory was fraud, and in it again the equity cases are unnoticed.

This amount of attention has been given to the English law because of its curious development and to contrast it with the Indiana law. Except as to cases of fraud, it is certainly difficult to say whether the rule that one is confined to the theory of his pleading is the law of England or not. But in Indiana there is no room for doubt. Beginning, it seems, in 1880, there has been a veritable stream of decisions maintaining the rule that one must abide by the theory of his pleading.[23] Perhaps the first case was *Neidefer* v. *Chastain*.[24] In it, to an action on a note, the defendant pleaded fraud. His plea also contained the statement, made in alleging the falsity of the representations, that the screens, the right to sell which was the consideration of the note, were worthless.[25] The fraud being inadequately alleged, it was claimed that this statement made the plea sufficient as alleging the failure of consideration. It was held that since the basis or theory of the plea was fraud the defense of failure of consideration was not open even if the statement were a sufficient allegation that the consideration had failed. The Court said:[26]

"The bare general allegation that an article was worthless, thrown into a plea attempting to set up the defense of fraud, can not make good a plea which without it would be bad. The material, substantive facts pleaded are those upon which the validity of the plea must depend; its sufficiency can not be made to depend upon a sweeping concluding statement that the article was wholly without value. If this were the rule, then every plea attempting the defense of fraud could be made good by adding the general allega-

[21](1853) 8 Ex. 724. Referred to above, p. 526.

[22]Connecticut Co. *v.* Kavanagh (1892) A. C. 473, 9.

[23]It is not necessary to cite all these cases here. They may be found by reference to Oölitic Stone Co. *v.* Ridge (Ind. 1908) 83 N. E. 246; 21 Ency. Pl. & Pr. 650. There have been practically no contrary decisions. But see Miller *v.* Eldridge (Ind. 1891) 27 N. E. 132.

[24](1880) 71 Ind. 363.

[25]The Court first stated that at least one paragraph of the answer did not contain this broad statement. But the Court then discussed the case as if the pleadings were as stated in text.

[26]Page 367.

tion that the article was valueless. This we think utterly inconsistent with the rule of pleading, and we also think that such a practice would lead to confusion and injustice. Especially would it lead to evil results in the trial courts, where time is not always allowed to critically examine pleadings, and a pleading made good by an isolated general statement might often mislead both court and counsel, who would naturally consider, not detached general conclusions, but the general frame and drift of the entire pleading."

Fundamentally this reasoning is that if the theory of the pleading could be departed from in favor of a new theory to be made up out of allegations not put in for the purpose of stating this new theory, the Court and opposing counsel would be likely to be misled as to what were the issues. True, the Court talks about the generality of the allegation. But it seems difficult to take objection to the plain statement of fact that certain screens are worthless. This line of reasoning has apparently been the basis of all the later cases.[27]

The New York law is important enough to warrant a separate consideration. The earliest cases the writer has seen arose after the introduction of code pleading. The first idea seems to have been that the code, having abolished forms, made it possible for the plaintiff to recover on a cause of action if his complaint alleged the necessary facts and his evidence proved them. The theory upon which the facts were alleged was thought wholly immaterial.[28] In *See* v. *Partridge*[29] the plaintiff's complaint was based on the theory that a certain award was void and that the plaintiff was entitled to recover the actual amount due as if there had been no award. The court permitted recovery of the amount awarded to the plaintiff by the arbitrators. The court relied mainly upon the code provision that where an answer has been filed "the court may grant him (*i. e.*, the plaintiff)[30] any relief consistent with the case made by the complaint and embraced within the issue." Of course this reasoning overlooked the question whether "the case made by the complaint" could properly be interpreted as meaning a case

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[27]See Tibbet *v.* Zurbuch (1898) 22 Ind. Ap. 354, 61.

[28]See *v.* Partridge (1853) 2 Duer 463; Wright *v.* Hooker (1851) 10 N. Y. 51; Marquat *v.* Marquat (1855) 12 N. Y. 336, 41; Emery *v.* Pease (1859) 20 N. Y. 62; White *v.* Madison (1862) 26 N. Y. 117, 125; Quintard *v.* Newton (1867) 5 Robt. 72, 78; Conaughty *v.* Nichols (1870) 42 N. Y. 83. The intimations to the contrary when the change would be one from law to equity, found in Heywood *v.* City (1856) 14 N. Y. 534, 40 and in Short *v.* Barry (1870) 3 Lans. 143, 147 may be disregarded, since it was held in Marquat *v.* Marquat, above, and other cases, that such a change could be made.

[29](1853) 2 Duer 463.

[30]This insertion was made by the present writer.

made out of allegations in the complaint but put there for a different purpose. This oversight makes the opinion unsatisfactory. The more usual argument is stated by Mr. Justice Edwards in *Wright* v. *Hooker*[31] in these words:

"I think these allegations are sufficient to sustain the judgment of the court that Hooker became liable as one of the drawers of the bill in suit. It is true that it would appear that the person who drew the complaint contemplated that Hooker would be held liable in some other capacity. But that is immaterial. The very object of the new system of pleading was to enable the court to give judgment according to the facts stated and proved, without reference to the form used or to the legal conclusions adopted by the pleader."

In *Conaughty* v. *Nichols*[32] the Court said:

"* * * the facts were fully stated, and the defendants apprized of what they were to meet upon the trial, and there is no pretense that they were surprised. If they chose to accept the complaint without moving to strike out any portion of it, or to compel the plaintiff to make it more definite, or to elect in regard to the form of action, they should not, upon the trial, have been allowed to prevent a recovery by the plaintiff of a judgment for the amount of his demand. * * * It is quite probable that the plaintiff intended, down to the trial, to recover against the defendants for a wrongful conversion of the proceeds of the sale of the property consigned to them, and doubtless the mistake should have been fatal but for the ample statement of facts contained in the complaint, which justified a recovery on contract for the amount of his demand. It does not follow that, because the parties go down to trial upon a particular theory, which is not supported by the proof, the cause is to be dismissed, when there are facts alleged in the complaint, and sustained by the evidence, sufficient to justify a recovery upon a different theory or form of action. There is no substantial reason why, under such circumstances, a party should be turned out of court and compelled to commence a new action, thereby occasioning expense, delay and multiplicity of suits to accomplish a just result."

Such was the state of the law in New York when *Ross* v. *Mather*[33] came up for final disposition. That fraud is fatal seems to be exemplified in a new way in this particular rivulet of the law. The complaint was rather ambiguous in theory, containing allegations sufficient to state a cause of action either upon a warranty or for fraudulent representations. The court held that the theory of the complaint was deceit and that without proof of fraud the

[31] (1851) 10 N. Y. 51, 59.
[32] (1870) 42 N. Y. 83, 8.
[33] (1872) 51 N. Y. 108.

plaintiff must fail. The court rather intimated that the warranty could not be sued on without waiving the fraud, that it was a case of election. That seems untrue. The remedy for the deceit and the remedy on the warranty are consistent and may be pursued in the same action.[34] For other argument the Court said:

"The two causes of action are entirely distinct, and there can be no recovery as for a breach of contract, where a fraud is the basis of the complaint.[35] *Conaughty* v. *Nichols*[36] is the only authority cited to the contrary, and it does not sustain that position."

This case, though rather poorly reasoned, appears to have led to a rule of the New York courts that if the theory of a complaint is plainly that of seeking to recover for a tort no recovery on a contract can be permitted.[37] The reason for this rule is well stated in *Barnes* v. *Quigley*.[38] It is substantially that of the Indiana courts, the possible surprise to the other party if one could depart from the apparent theory of his pleading. It is obvious that this reason applies just as fully to any real change of theory as it does to a change from contract to tort or *vice versa*. Has there been a broader application of the principle?

A change from a theory that the action was legal to a theory that it was equitable seems as fundamental as one from tort to contract. The earlier cases made no objection to any change of theory and so of course permitted this.[39] In *Williams* v. *Slote*[40] this early rule was followed, there being no reference to *Ross* v. *Mather*[41] decided meanwhile. In *Husted* v. *Van Ness*,[42] however, the court apparently held that a complaint with an equitable theory would not sustain a legal judgment. The case is not clear, and furthermore the court relied upon *Oakville Co.* v. *Co.*,[43] a case of

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[34]Joy *v.* Bitzer (1889) 77 Ia. 73.

[35]The court here referred to cases previously cited by it which need not be noticed.

[36](1870) 42 N. Y. 83. Quoted above, p. 530.

[37]Ledwich *v.* McKim (1873) 53 N. Y. 307, 16 (*semble*); Barnes *v.* Quigley (1874) 59 N. Y. 265; Peck *v.* Root (1875) 5 Hun 547; Neftel *v.* Lightstone (1879) 77 N. Y. 96, 98 (*semble*); Sparman *v.* Keim (1880) 83 N. Y. 245 (*semble*); Allen *v.* Allen (1889) 52 Hun 398; Stafford *v.* Azbell (1893) 6 Misc. 89 (*semble*, stating rule generally.)

[38](1874) 59 N. Y. 265.

[39]See note 28, and, especially, Marquat *v.* Marquat (1855) 12 N. Y. 336; Emery *v.* Pease (1859) 20 N. Y. 62.

[40](1877) 70 N. Y. 601.

[41](1872) 51 N. Y. 108.

[42](1899) 158 N. Y. 104.

[43](1887) 105 N. Y. 658.

variance.[44] It is difficult to tell what the New York law is on this point.

New York cases involving a change of theory without involving a change from tort to contract or from law to equity are not numerous and what the rule will ultimately be is not clear. The cases are epitomized in a note.[45] The significant thing is that here also there are cases compelling a party to abide by his theory. *Ross* v. *Mather*[46] has had the effect of unsettling the law as laid down in the earlier cases.[47] The Indiana view may come to be the law of New York.

It is sufficiently apparent by this time that no general statement of the law on this point can be made. Nice and probably unfounded discriminations are made within a single jurisdiction. In many states later cases are decided without attention to and probably without any but judicial knowledge of prior adjudications. In a recent Kansas case[48] the Court adopts the Indiana rule in the strongest language. It relies wholly on Indiana cases and apparently had no knowledge of two earlier cases[49] in its own reports the reasoning in which is to the contrary. One may with reasonable assurance say that Wisconsin compels one to abide by his theory.[50] In Massachusetts apparently the opposite view is taken.[51] Elsewhere the cases are either isolated or so inconsistent as to make a general statement impracticable.[52]

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[44]For the distinction between our question and that of variance, see above, pp. 523-524.

[45]Harrison *v.* Co. (1885) 100 N. Y. 621 (complaint in ejectment containing allegations showing a trespass sustained on latter theory); Prince *v.* Ridge (1900) 66 N. Y. Supp. 454 (complaint for an assault containing allegations showing a battery *not* sustained on latter theory); Cassidy *v.* Uhlmann (1902) 170 N. Y. 505, 37 (complaint for fraud probably also alleging a case of negligence *not* sustained on latter theory, but case arose after appeal.)

[46](1872) 51 N. Y. 108.

[47]See above, pp. 529-530.

[48]Gretner *v.* Fehrenschield (1902) 64 Kan. 764 (merely a dictum).

[49]Akin *v.* Davis (1873) 11 Kan. 580 (question arose for first time on appeal); Kunz *v.* Ward (1882) 28 Kan. 132 (same).

[50]Newton *v.* Allis (1860) 12 Wis. 421; Supervisors *v.* Decker (1872) 30 Wis. 624 (leading case); Horn *v.* Ludington (1873) 32 Wis. 73; Pierce *v.* Carey (1875) 37 Wis. 232; Wrigglesworth *v.* Same (1878) 45 Wis. 255; Sweeney *v.* Vroman (1884) 60 Wis. 278; Trustees *v.* Kilbourn (1889) 74 Wis. 452; Kruczinski *v.* Neuendorf (1898) 99 Wis. 264 (*semble*).

[51]Boston R. R. *v.* Bartlett (1849) 3 Cush. 224; Lamson *v.* Drake (1870) 105 Mass. 564, 8.

[52]In accord with the Indiana rule are: Strange *v.* Watson (1847) 11 Ala. 324, 6 (*semble*); Oden *v.* Lockwood (1902) 136 Ala. 514; Jones *v.* Minogue (1874) 29 Ark. 637, 48 (*semble*); Hayes *v.* Fine (1891) 91 Cal. 391, 9; Prince *v.* Lamb (1900) 128 Cal. 120, 5; Westerfield *v.* Co. (1900) 129 Cal. 68, 81; Britton *v.* Brewster (1880) 2 Fed. 160, 7 (*semble*); Holton *v.* Guinn (1895) 65 Fed. 450; Baker *v.* Updike (1895) 155 Ill. 54, 7; Harms *v.* Jacobs

This distinct conflict of authority is not very surprising, since the arguments drawn from legal theory or substantial justice are evident and rather evenly balanced. For the Indiana view the argument of surprise, already sufficiently stated,[53] is the chief one. And there are indications, especially in the New York cases,[54] that where the danger of surprise is small the Indiana rule will not be applied. For the view that one may depart from his theory it may be said that it avoids the deciding of cases on what will certainly appeal to a layman as a technical ground. If the facts are alleged in accordance with the provisions of the codes, is there not a partial return to forms when it is required that the facts shall be stated in accordance with some particular theory? That the wrong theory is chosen will almost always be the fault of the lawyer rather than of the client. When technical errors of the attorney prove disastrous, the client is likely to hurl epithets at the law. Our procedure is already quite vulnerable to attack. The weak spots should not be increased. Perhaps to hold that, when the adoption of a theory by one party *has* in fact misled the other to his detriment, then the latter shall be entitled to such relief as

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(1895) 158 Ill. 505; French *v.* Goodman (1897) 167 Ill. 345; Boyce *v.* Allen (1898) 105 Ia. 249, 55; Wilson *v.* Eggleston (1873) 27 Mich. 257, 61; Nicholson *v.* Dyer (1888) 45 Mich. 610, 16 (change not suggested until after appeal); New Orleans Ry. *v.* Hurst (1858) 36 Miss. 660, 8 (*semble*); State *v.* Dehlinger (1870) 46 Mo. 106 (*semble*); Clements *v.* Yeates (1879) 69 Mo. 623; Summer *v.* Rogers (1886) 90 Mo. 324 (change first suggested in appellate court); Huston *v.* Tyler (1897) 140 Mo. 252; Higley *v.* Gilmer (1878) 3 Mont. 90, 104 (implication, *accord*); Appeal of Thompson (1889) 126 Pa. St. 367; Tillinghast *v.* Champlin (1856) 4 R. I. 173, 191-202 (like English cases in equity holding that where fraud is alleged, it must be established or suit fails; cf. R. I. case cited below as *contra*); Eyre *v.* Potter (U. S. 1853) 15 How. 42, 56.

To the contrary are: Pindall *v.* Trevor (1875) 30 Ark. 249, 60; White *v.* Lyons (1871) 42 Cal. 279; Hurlbutt *v.* Co. (1892) 93 Cal. 55; Faulkner *v.* Bank (1900) 130 Cal. 258; Hollister *v.* Lefevre (1868) 35 Conn. 456, 61; Whalen *v.* Sheridan (1879) Fed. Cases, 17,476; Hall *v.* Co. (1882) 15 Fed. 57; Adams *v.* Co. (1888) 36 Fed. 212; Allen *v.* Woodruff (1880) 96 Ill. 11, 18 (possibly holding merely that did recover according to real theory of bill); Way *v.* Co. (1887) 73 Ia. 463, 4 (possibly holding merely that can recover on either of two theories); Thomas *v.* Hite (1845) 5 B. Mon. 590, 3; Tiernan *v.* Poor (1829) 1 G. & J. 216, 30; Cochrane *v.* Adams (1883) 50 Mich. 16, 17 (*semble*); Darrah *v.* Boyce (1886) 62 Mich. 480, 5 (*semble*); Dayton *v.* Same (1888) 68 Mich. 437; Garner *v.* Co. (1863) 34 Mo. 235; Comings *v.* Co. (1871) 48 Mo. 512; Kneale *v.* Price (1886) 21 Mo. Ap. 295; Crothers *v.* Acock (1891) 43 Mo. Ap. 318, 23; Blair *v.* Porter (1861) 13 N. J. Eq. 267; McElwee *v.* Blackwell (1886) 94 N. C. 261 (facts not clear); Cook *v.* Haggerty (1859) 36 Pa. St. 67 (also allowed change in form of action); Aldrich *v.* Wilcox (1873) 10 R. I. 405, 17; Martin *v.* Lincoln (Tenn. 1880) 4 Lea 334.

See also Walton *v.* Perkins (1881) 28 Minn. 413.

[53]See pp. 527-8; 529; 531.

[54]See Neftel *v.* Lightstone (1879) 77 N. Y. 96, 98-9.

will enable him to avoid the effects of his misunderstanding, would be a satisfactory solution. Proper relief might consist of an order that the misleading pleading be amended and that the other party have a right to reply to it anew. In many cases, no doubt, any harm that had occurred could be remedied without making worthless so much of the proceedings that had already taken place. The reasoning of the Court in *Conaughty* v. *Nichols*[55] that where the pleading is misleading the defendant should move to make it definite or to have the pleader elect between the possible theories, and that if he proceeds without doing so he is to be taken as fully understanding the pleading, seems very weak. If he in fact recognizes the ambiguity, the only situation in which he could move to have it corrected, then he is plainly not actually misled by it and would under the solution just suggested be entitled to no relief. If he does not recognize the ambiguity, the reasoning of the Court could be thought right only on the ground that he was at fault in not recognizing it. But the pleader himself was at fault in filing such a pleading and he was first in fault. Also to refuse all relief because of this error of the opposing party's attorney, is to again punish the client for his lawyer's fault with unnecessary severity; —a thing, as suggested above, likely to bring the law into disrepute. The disposition of costs may be used to adjust the burdens arising from a possible re-trial of the case as equitably as possible.

In connection with the general subject a number of minor questions may be asked. These will now be disposed of as briefly as possible.

Does the rule that one cannot depart from the theory of his pleading apply to pleas, answers, replications, and other pleadings, or only to the declaration, complaint, bill or petition of the complainant? There seems to be no reason for drawing any distinction along this line. The Indiana cases hold that pleas must be sustained according to their theory.[56] The few cases elsewhere have taken the opposite view,[57] but without suggesting that the fact that the question arose as to a plea made any difference. Presumptively there is no such distinction.

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[55](1870) 42 N. Y. 83, 8. Quoted above, p. 530.

[56]Neidefer *v.* Chastain (1880) 71 Ind. 363; Colglazier *v.* Same (1888) 117 Ind. 460.

[57]Le Bret *v.* Papillon (1804) 4 East 502; Whalen *v.* Sheridan (1879) 17 Blatchf. 9; Fed. Cases 17,476; Springer *v.* Dwyer (1872) 50 N. Y. 19; Hemmingway *v.* Poucher (1885) 98 N. Y. 281, 7. In the following cases it was held that an answer pleaded as a defense could not be used as a cross-demand or *vice versa*: Hinkle *v.* Margerum (1875) 50 Ind. 240, 6; Conger *v.* Miller (1885) 104 Ind. 592; Bates *v.* Rosekrans (1861) 23 How. Pr. 98.

A number of cases have raised this problem. The plaintiff drew his declaration or complaint on one theory. He wished to change to a new theory but there were not enough facts alleged in the declaration or complaint to warrant that.[58] These necessary facts, however, were alleged in the defendant's pleading. Would this enable him to adopt the new theory? Obviously not, in a jurisdiction where the Indiana view prevails: there he cannot depart from his theory even when the necessary facts are in the declaration. In other jurisdictions the question is one of the limits of express aider.[59] There seems to be nothing in that doctrine forbidding this application of it, unless the use of the word aider indicates that there must be something in the declaration to aid. If that were taken to be true, then, unless *some* of the allegations necessary to state the new cause of action were in the declaration the plaintiff would fail. A few of the cases have contained just that state of facts. Such a distinction, however, seems rather valueless. The better view would, therefore, appear to be that the plaintiff can recover.[60]

It is plain that even if a party be allowed to change his theory yet he cannot do this where, considering the suit as on the new theory, the proceedings would be defective, as for non-joinder of parties[61] or misconception of remedy.[62]

Suppose that a count or paragraph has two theories or that it is uncertain what its theory is. It seems to be universally conceded that this is no objection on demurrer.[63] The remedy is by motion.

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[58]See above, p. 524.

[59]See 4 Encyc. Pl. & Pr. 608.

[60]Pindall *v.* Trevor (1875) 30 Ark. 240, 60; Mortimer *v.* Orchard (1793) 2 Ves. Jr. 243; Cook *v.* Smith (1880) 54 Ia. 636; Kunz *v.* Ward (1882) 28 Kan. 132 (*semble*); Rose *v.* Mynatt (Tenn. 1834) 7 Yerg. 30, 36; Shannon *v.* Erwin (Tenn. 1873) 11 Heisk. 337; Heinz *v.* Bank (Tenn. 1897) 48 S. W. 133. *Accord.*

Mercier *v.* Lewis (1870) 39 Cal. 532; Marsh *v.* Bulteel (1822) 5 B. & Al. 507; Head *v.* Baldrey (1837) 6 A. & E. 459, 69 (*semble*); Lindsay *v.* Lynch (1804) 2 Sch. & Lef. 1, 9; Willis *v.* Evans (1802) 2 Ball & Beat. 225 (*semble*); Rand *v.* Bank (1877) 77 N. C. 152; Grant *v.* Burgwyn (1883) 88 N. C. 95, 100; Johnson *v.* Finch (1885) 93 N. C. 205; Willis *v.* Branch (1886) 94 N. C. 142, 7; (But see Harris *v.* Sneeden (1889) 104 N. C. 369, 76); Perls *v.* Co. (1890) 15 Daly 517. *Contra.*

See also Jameson *v.* Shelby (Tenn. 1840) 2 Humph. 198; Neal *v.* Robinson (Tenn. 1847) 8 Humph. 435; Blair *v.* Porter (1861) 13 N. J. Eq. 267.

[61]Easterly *v.* Barber (1876) 66 N. Y. 433, 40.

[62]Heywood *v.* City (1856) 14 N. Y. 534, 40.

[63]Kreag *v.* Anthus (1891) 2 Ind. Ap. 482; Mark *v.* North (1900) 155 Ind. 575; Oölitic Co. *v.* Ridge (Ind. 1908) 83 N. E. 246 (*semble*); Akin *v.* Davis (1873) 11 Kan. 580, 90 (*semble*); Seckinger *v.* Co. (1895) 129 Mo. 590, 602; Quintard *v.* Newton (N. Y. 1867) 5 Robt. 72, 9 (*semble*); Kuehn *v.* Wilson (1860) 13 Wis. 104, 8 (*semble*).

If two theories are stated the remedy is by motion to separately state the causes of action,[64] or to elect between them.[65] If no such motion is made, in a jurisdiction requiring one to abide by his theory, the Court will determine which is the true theory and the party must sustain that.[66] In other jurisdictions the party may succeed by proving either theory.[67] If it is uncertain what the theory is, the remedy is by motion to make definite[68] or in some jurisdictions, if the two possible theories would be inconsistent, to elect between them.[69] In a jurisdiction following Indiana, if no such motion were made, the party would have to sustain his pleading on its true theory.[70] In other states he could recover on either possible theory.[71]

The theory of a case does not involve the amount of relief. It has to do only with the ground for relief. Therefore one does not depart from his theory when he obtains less relief than he asked for.[72] Likewise if the relief to which one is entitled is slightly different from that asked, this does not amount necessarily to a change of theory.[73] But this must not be confused with such a change as seeking an injunction instead of damages[74] or specific performance instead of legal recovery.[75] The allegations requisite to obtain equitable relief are different from those necessary to obtain legal relief. The theory of the cause of action, therefore, is different.

Granting that it has become necessary to determine the theory of a pleading, how is that to be done? At common law the form of action is not settled by the name given to it by the pleader, but by asking what form is indicated by the count as a whole, the

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[64]Mark *v.* North (1900) 155 Ind. 575.

[65]Meyers *v.* McQueen (1891) 85 Mich. 156, 60; Seckinger *v.* Co. (1895) 129 Mo. 590, 602 (*semble*).

[66]Oölitic Co. *v.* Ridge (Ind. 1908) 83 N. E. 246 (*semble*). But a complaint praying alternative relief is good. Culbertson *v.* Munson (1885) 104 Ind. 451.

[67]Williams *v.* U. S. (1890) 138 U. S. 514.

[68]Quintard *v.* Newton (N. Y. 1867) 5 Robt. 72, 9; Com. Bank *v.* Pfeiffer (1888) 108 N. Y. 242, 6 (*semble*); Kuehn *v.* Wilson (1860) 13 Wis. 104, 8.

[69]Akin *v.* Davis (1873) 11 Kan. 580, 90 (*semble*).

[70]Oölitic Co. *v.* Ridge (Ind. 1908) 83 N. E. 246 (*semble*).

[71]Austin *v.* Seligman (1883) 18 Fed. 519 (*semble*); Neilson *v.* Fry (1866) 16 Oh. St. 552.

[72]Yorn *v.* Bracken (1899) 153 Ind. 492.

[73]Matthias *v.* Warrington (1893) 89 Va. 533; Leonard *v.* Rogan (1866) 20 Wis. 540.

[74]City *v.* Uhl (1884) 99 Ind. 531, 9.

[75]Horn *v.* Ludington (1873) 32 Wis. 73.

substantial allegations being given chief consideration.[76] A similar rule prevails in determining the theory of a pleading. The important allegations of fact have the greatest weight. The theory that the pleader must have had in mind in making them is the true theory[77] subject to the qualifications about to be stated. A name given to the pleading does not determine its theory.[78] And as in other cases of construction some allegations may be disregarded.[79] It is now pretty well settled that the prayer for relief does not de-

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[76]Sheppard *v.* Furniss (1851) 19 Ala. 760; Whilden *v.* Bank (1879) 64 Ala. 1, 26; Sharpe *v.* Bank (1888) 87 Ala. 644; Humiston *v.* Smith (1852) 22 Conn. 19; Savignac *v.* Roome (1794) 6 T. R. 125; Ansell *v.* Waterhouse (1817) 6 M. & S. 385; Brill *v.* Neele (1819) 3 B. & Al. 208; Corbett *v.* Packington (1827) 6 B. & C. 268; White *v.* Pulley (1886) 27 Fed. 436; McGinnity *v.* Laguerenne (1848) 10 Ill. 101 (and see Cruickshank *v.* Brown (1848) 10 Ill. 75; Smith *v.* Webb (1854) 16 Ill. 105); Toledo R'y Co. *v.* McLaughlin (1872) 63 Ill. 389; Cornes *v.* Harris (1848) 1 N. Y. 223; Smith *v.* Seward, (1846) 3 Pa. St. 342; Cook *v.* Haggarty (1850) 36 Pa. St. 67 (going too far); Angus *v.* Dickerson (1838) Meigs 450, 66; Booker *v.* Donohue (1897) 95 Va. 350.

[77]Fordyce *v.* Nix (1893) 58 Ark. 136; Prince *v.* Lamb (1900) 128 Cal. 120; Westerfeld *v.* Co. (1900) 129 Cal. 68, 81; Coe *v.* Waters (1895) 7 Colo. Ap. 203; Baxter *v.* Camp (1898) 71 Conn. 245, 51; Blalock *v.* Society (1896) 75 Fed. 43; Adams *v.* Lamar (1850) 8 Ga. 83, 7; City Ry. *v.* Brauss (1883) 70 Ga. 368; Allen *v.* Woodruff (1880) 96 Ill. 11, 18; City *v.* Uhl (1884) 99 Fed. 531, 9; First Bank *v.* Root (1886) 107 Ind. 224; Louisville Co. *v.* Bryan (1886) 110 Ind. 51; Gregory *v.* Co. (1887) 112 Ind. 385; Martin *v.* Same (1888) 118 Ind. 227, 36; Jones *v.* Cullen (1895) 142 Ind. 335, 41; Oölitic Co. *v.* Ridge, (Ind. 1908) 83 N. E. 246 (*semble*); U. P. Ry. *v.* Shook (1896) 3 Kan. Ap. 710; Paige *v.* Barrett (1890) 151 Mass. 67; Church *v.* Co. (1898) 118 Mich. 219, 41; New Orleans Ry. *v.* Hurst (1859) 36 Miss. 660; State *v.* Dehlinger (1870) 46 Mo. 106; Rodgers *v.* Same (1852) 11 Barb. 595, 600; Ridder *v.* Whitlock (1856) 12 How. Pr. 208; Williams *v.* Slote (1877) 70 N. Y. 601; Lindsay *v.* Mulqueen (1882) 26 Hun 485; McDonough *v.* Dillingham (1887) 43 Hun 493; Bell *v.* Merrifield (1888) 109 N. Y. 202; O'Brien *v.* Ottenberg (1894) 28 N. Y. Supp. 605; Leach *v.* Smith (1898) 27 N. Y. App. Div. 290; MacArdell *v.* Olcott (1907) 189 N. Y. 368, 77; Corry *v.* Gaynor (1871) 21 Oh. St. 277; Tiffin Co. *v.* Stoehr (1896) 54 Oh. St. 157; Raymond *v.* Ry. (1897) 57 Oh. St. 271, 84; Denman *v.* Ry. (1897) 52 Neb. 140; Yager *v.* Bank (1897) 52 Neb. 321; Tillinghast *v.* Champlin (1856) 4 R. I. 173, 202; Hammond *v.* Co. (1875) 6 S. Car. 130; Atlantic Ry. *v.* Laird (1896) 164 U. S. 393, 7; Booker *v.* Donohoe (1897) 95 Va. 359; Lane *v.* Cameron (1875) 38 Wis. 603; Medcraft *v.* Dartt (1886) 67 Wis. 115; Potter *v.* Van Norman (1889) 73 Wis. 339, 44; McKeon *v.* Co. (1896) 94 Wis. 477, 81.

[78]Martin *v.* Same (1888) 118 Ind. 227, 36 (*semble*); Woodward *v.* Mitchell (1894) 140 Ind. 406 (*semble*). So also the name given a pleading does not determine what kind of a pleading it is. McClanahan *v.* Williams (1893) 136 Ind. 30.

[79]Fordyce *v.* Nix (1893) 58 Ark. 136; Thomson *v.* Eastwood (1877) 2 A. C. 215, 241, 250; Blalock *v.* Society (1896) 75 Fed. 43; Gregory *v.* Co. (1887) 112 Ind. 385; Kunz *v.* Ward (1882) 28 Kan. 132; Byxbie *v.* Wood (1862) 24 N. Y. 607; Greentree *v.* Rosenstock (1875) 61 N. Y. 583, 9; Miller *v.* Barber (1876) 66 N. Y. 558, 64; Neftel *v.* Lightstone (1879) 77 N. Y. 96; Leach *v.* Smith (1898) 27 N. Y. App. Div. 290; Harris *v.* Sneeden (1889) 104 N. C. 369, 75; Dungan *v.* Read (1895) 167 Pa. St. 393; Tillinghast *v.* Champlin (1856) 4 R. I. 173, 202; Bailey *v.* Co. (1890) 77 Wis. 336.

termine the theory of the action,[80] but that at least where the theory is hard to determine[81] and probably in all cases[82] the prayer for relief may be considered in deciding what the theory is. There is considerable doubt whether other proceedings in the case, especially the summons, may be considered in determining the theory.[83] There seems to be no objection to such a use if it be kept in mind

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[80]Ross *v.* Purse (1891) 17 Colo. 24, 7; Adams *v.* Lamar (1850) 8 Ga. 83; Houck *v.* Graham (1885) 106 Ind. 195; McGuffey *v.* McClain (1891) 130 Ind. 327; State *v.* Ogan (1902) 159 Ind. 119; Hale *v.* Bank (1872) 49 N. Y. 626, 31; Williams *v.* Slote (1877) 70 N. Y. 601; Bell *v.* Merrifield (1888) 109 N. Y. 202; Bennett *v.* Vonder Bosch (1898) 26 N. Y. App. Div. 311; Corry *v.* Gaynor (1871) 21 Oh. St. 277; Reed's Admr. *v.* Reed (1874) 25 Oh. St. 422; Tiffin Co. *v.* Stoehr (1895) 54 Oh. St. 157; Hammond *v.* Co. (1874) 6 S. Car. 130; Bailey *v.* Co. (1890) 77 Wis. 336. *Accord.*

Christian Church *v.* Scholte (1856) 2 Ia. 27; Price *v.* Co. (1890) 80 Ia. 408; Boyce *v.* Allen (1898) 105 Ia. 249, 55; Dows *v.* Green (1849) 3 How. Pr. 377 (see New York cases *accord* above); Lowber *v.* Connit (1874) 36 Wis. 176 (see Wisconsin cases *accord* above). *Contra.*

[81]Yeater *v.* Hines (1886) 24 Mo. App. 619; Harral *v.* Gray (1880) 10 Neb. 186; Keens *v.* Gaslin (1888) 24 Neb. 310, 16; Yager *v.* Bank (1897) 52 Neb. 321; Spalding *v.* Same (1848) 3 How. Pr. 297; Rodgers *v.* Same (1852) 11 Barb. 595; Chambers *v.* Lewis (1860) 2 Hilton 591; Bates *v.* Rosekrans (1861) 23 How. Pr. 98, 102 (concerning an answer); Mills *v.* Bliss (1873) 55 N. Y. 139; Central Co. *v.* Sheridan (1892) 1 Misc. 386; Corry *v.* Gaynor (1871) 21 Oh. St. 277; Gillett *v.* Treganza (1861) 13 Wis. 472; Cobb *v.* Smith (1868) 23 Wis. 261; Bailey *v.* Co. (1890) 77 Wis. 336. In O'Brien *v.* Fitzgerald (1894) 143 N. Y. 377 the court held that in a doubtful case the prayer determined the theory. Of course under a common code provision if no answer is filed no relief beyond that prayed can be given. Swart *v.* Boughton (1885) 35 Hun 281.

[82]Prince *v.* Lamb (1900) 128 Cal. 120; Blalock *v.* Society (1896) 75 Fed. 43; Seymour *v.* Van Curen (1859) 18 How. Pr. 94; Miller *v.* Barber (1876) 66 N. Y. 558, 64; Goodwin *v.* Griffis (1882) 88 N. Y. 629, 38; McDonough *v.* Dillingham (1887) 43 Hun 493, 6; MacArdell *v.* Olcott (1907) 189 N. Y. 368, 78; Reed's Adm'r. *v.* Reed (1874) 25 Oh. St. 422; Brown *v.* Runals (1861) 14 Wis. 693; Potter *v.* Van Norman (1889) 73 Wis. 339, 44. *Accord.*

Hale *v.* Bank (1872) 49 N. Y. 626, 31; Tiffin Co. *v.* Stoehr (1895) 54 Oh. St. 157. *Contra.*

[83]That other proceedings in the case may be considered, see City Ry. *v.* Brauss (1883) 70 Ga. 368, 77 (defendant's plea: point not considered by the court); Elwood *v.* Gardner (1871) 45 N. Y. 349, 54 (summons); Ledwich *v.* McKim (1873) 53 N. Y. 307, 16 (summons); Peck *v.* Root (1875) 5 Hun 547 (summons); Miller *v.* Barber (1876) 66 N. Y. 558, 64 (summons); Catlin *v.* Co. (1880) 11 Abb. N. C. 377 (summons); Supervisors *v.* Decker (1872) 30 Wis. 624, 32 (summons).

To the contrary, see Metropolis Co. *v.* Lynch (1896) 68 Conn. 459, 71 (that plaintiff had defendant arrested and demurred to a plea in abatement as if action were tort); Tibbet *v.* Zurbuch (1898) 22 Ind. Ap. 354, 63 (evidence offered); Chambers *v.* Lewis (1860) 10 Abb. Pr. 206 (summons); Welsh *v.* Darragh (1873) 52 N. Y. 590 (defendant's answer, thinking perhaps rightly that it could not throw light on the complaint); Gopen *v.* Crawford (1875) 53 How. Pr. 278 (summons); Wood *v.* Hope (1876) 2 Abb. N. C. 186 (like Welsh *v.* Darragh above); Goodwin *v.* Griffis (1882) 88 N. Y. 629, 30 (like Welsh *v.* Darragh above); Haynes *v.* McKee (1896) 18 Misc. 361 (summons); Barneycastle *v.* Walker (1885) 92 N. C. 198 (summons).

See also Chambers *v.* Lewis (1860) 2 Hilt. 591 (summons); Adams *v.* Ash (1887) 46 Hun 105 (judgment rendered); Stafford *v.* Azdell (1893) 6 Misc. 89 (order for arrest of defendant).

that they are to be looked at merely to aid in construing the pleading in question. The problem is not, what sort of a pleading did the party intend to file, but rather, what is the theory of the pleading he has filed. Of course questions may arise involving something different from the theory of the pleading and where the other proceedings may be properly given a greater influence in the decision.[84] Clearly the summons cannot determine the theory of the complaint.[85]

There are a few curious cases which hold that when the theory is doubtful it is to be decided by some fixed rule. A couple of cases in New York adopt the rule that that theory shall be selected which is most disadvantageous to the pleader.[86] Thus where it was doubtful whether the theory was that the action was on a contract or for a tort and the summons was the form for a contract action, the theory of the complaint was held tort because that would create a variance between the summons and the complaint which would subject the complaint to an adverse motion and so be less advantageous to the plaintiff.[87] In the other case the complaint was held to be on a contract as that would cause stricter rules as to damages to be applied to the plaintiff's action.[88] Perhaps these cases are a logical application of the common law rule that pleadings must be construed adversely to the pleader. But they certainly seem contrary to the spirit of the New York Code under which they were decided. The first code in 1848 provided for a liberal construction of pleadings.[89] There are some rather extraordinary cases holding that this provision applies only to matters of form.[90] The cases under discussion must be added to these. But we surely discover absurdity when we find it held that if it be doubtful whether the action be on a contract or for a tort that it is to be taken to be on a contract.[91] No reasons were given in the case originating this doctrine nor in those following. Presumably none

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[84]Sligh Co. *v.* Shannon (1897) 113 Mich. 473; Leeper *v.* Taylor (1848) 11 Mo. 312, 21.

[85]Greentree *v.* Rosenstock (1875) 61 N. Y. 583, 90.

[86]Ridder *v.* Whitlock (1856) 12 How. Pr. 208, 12; May *v.* Georger (1897) 21 Misc. 622.

[87]Ridder *v.* Whitlock (1856) 12 How. Pr. 208.

[88]May *v.* Georger (1897) 21 Misc. 622.

[89]Rev. Sts. of N. Y. 1848, Vol. III, p. 742, sec. 136.

[90]See 4 Ency. Pl. & Pr. 753.

[91]Goodwin *v.* Griffis (1882) 88 N. Y. 629, 39 (the case that originated this notion); McDonough *v.* Dillingham (1887) 43 Hun 493; Central Co. *v.* Sheridan (1892) 1 Misc. 386; May *v.* Georger (1897) 21 Misc. 622; Foote *v.* Foulke (1900) 67 N. Y. Supp. 368. All the cases go back to Goodwin *v.* Griffis, above.

could be given. Equally absurd are two Mississippi cases holding that under such circumstances the suit is to be deemed for a tort.[92]

When the case has been tried at *nisi prius* by all parties on the view that a pleading has a certain theory, that view will be adhered to on appeal, if there are sufficient allegations in the pleading to support the theory. If there are not sufficient allegations, the recovery below involved a variance between allegations and proof and was therefore erroneous.[93] When there are sufficient allegations the view adopted below will be followed whether the upper Court thinks that view a right one[94] or a wrong one.[95]

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[92]Heirn *v.* McCaughn (1856) 32 Miss. 17, 39; New Orleans Ry. *v.* Hurst (1859) 36 Miss. 660.

[93]See above, p. 524.

[94]McDaniel *v.* Pattison (1893) 98 Cal. 86; Conn. Co. *v.* Kavanagh (1892) A. C. 473, 9 (*semble*); Oölitic Co. *v.* Ridge (Ind. 1908) 83 N. E. 246 (containing very numerous Indiana citations); Raub *v.* Nisbett (1896) 111 Mich. 38; Seckinger *v.* Co. (1895) 129 Mo. 590, 602; Salisbury *v.* Howe (1881) 87 N. Y. 128; Wait *v.* Borne (1890) 123 N. Y. 592, 605; Matthews *v.* Same (1892) 133 N. Y. 679; Haynes *v.* McKee (1896) 18 Misc. 361. Many citations are found in 21 Ency. Pl. & Pr. 664.

[95]Broughel *v.* Co. (1900) 72 Conn. 617, 27; Akin *v.* Davis (1873) 11 Kan. 580, 9; Kunz *v.* Ward (1882) 28 Kan. 132. *Accord.*

Raymond *v.* Co. (1897) 57 Oh. St. 271, 83. *Contra.*

In Neftel *v.* Lightstone (1879) 77 N. Y. 96 it was held that the ruling of the trial court on the question of the true theory of a pleading would not be reversed unless very clearly wrong.

THE NEW AMERICAN CODE OF LEGAL ETHICS.

It was natural that the general trend of public opinion in this country in favor of codification, as against unwritten law, should of late years turn the attention of the bar to the question whether the rules of legal ethics ought not to be put in an authoritative form. In a number of the States steps have been taken in this direction, and the last Summer has given us a code stamped with the approval of the American Bar Association. It is the work of a strong committee, which has proceeded slowly and carefully. The task assigned to them was no easy one. It was that of definition and selection. *Ommis definitio periculosa est;* and to select means to exclude—always a difficult thing to do to general satisfaction, where questions of morals are concerned.

One is struck, in reading the brief code which has been thus elaborated, by the extent to which the policy of exclusion has been carried. Nothing is to be found as to the duties of the Judge; and little as to many minor matters pertaining to a lawyer's conduct. In both these respects the action of the Association seems wise.

It is an association of members of the bar, as its name denotes. A Judge does not, in becoming such, cease to be a lawyer; and therefore many of them belong to it, and take an active part in its proceedings. Justice Brewer was upon the committee which framed this code. But it is rather for courts to lay down rules for the bar, than for the bar to prescribe them for the courts. If Judges need to be reminded of their duties, some of their number should assume the task, and it should be wholly dissociated from any rules as to the conduct of those who may practice before them.

The codes of ethics thus far adopted by the State Bar Associations are considerably longer than that now approved by the American Bar Association. They contain more rules, and more words in stating a rule.

They frequently seek to fortify a canon of conduct by subjoining an argument for following it. The reasons given are generally those of policy. Follow it, they argue, because you will succeed better in your profession, if you do. Avoid concealing your strong points until the closing argument, because the court and jury will think you must have a weak cause, if you resort to such a course. Do not assert your belief in the justice of your client's cause, because if you do for one, you must do it for all;

else the jury will think that, whenever you omit such a statement, you know that your claims are unfounded. Be prompt and punctual, and it will strengthen your hold on your clients.

The new code of the American Bar Association makes no such appeals to motives of expediency and self-advantage. It occupies a higher plane. Its canons are left to rest on principles of right and honor. The only exception, if it can be deemed such, is the declaration in the preamble that the future of our country depends upon the maintenance of Justice pure and unsullied, and that this can only be secured if the conduct and motives of the American lawyer merit the approval of all just men. But here the good of the republic is looked at, not that of the individual.

One canon of great importance has been adopted which is to be found in the code of no State Bar Association except that of Kentucky, and is there stated with much less force and precision. This expresses the duty of the bar with respect to the choice of Judges. It is asserted to be an active duty; and in that connection one rule of conduct is mentioned which all accepting judicial office should be expected to follow. It is to forego all other employments whatsoever which might embarrass their free and fair consideration of questions brought before them for decision.

To mention but one reason for insisting on this obligation, it is one of the petty scandals of our American judicial system that a Judge of a minor court, provided with several Judges, sometimes appears as counsel one day and as Judge the next. Obviously, one who has argued before such a tribunal in favor of a debatable legal proposition ought not, at the same term, to charge a jury in respect to it. Nor could his refusal to preside over the trial of a cause in which that question might arise relieve the difficulty of the situation. It simply substitutes one wrong for another. The public have the right to demand that he shall not disqualify himself from doing what he was appointed to do, and inconvenience others to profit himself.

It is to take a long step forward for the representatives of the American bar to declare that it must steadfastly endeavor "to prevent political considerations from outweighing judicial fitness in the selection of Judges" and "should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench." In the political discussions of the last few years, the American judiciary has been a frequent subject of attack. There is no doubt that among its members are some who are incompetent to undertake its responsibilities, and who, when appointed or elected,

were known to be thus incompetent by the members of the bar to which they belonged. The appointing power or the electorate, if the choice be by popular vote, will seldom, if ever, select a man whom his professional associates come forward to declare to be unfit to exercise the duties of such an office. In asserting it to be their duty to make such declarations, in the proper quarter, be it in the office of the Governor, or in a nominating convention, or in a preliminary meeting of the party leaders, or by addressing the public at large, this new canon ought to have a large and lasting effect. In no country is the Judge so fully a part of the political administration of civil government as in the United States, because nowhere else has he such a power of declaring statutes to be void. In no country, therefore, can the bar, by preventing improper selections for judicial office, do so much to promote the proper transaction of public business, as well as the proper protection of private interests.

The code occasionally contains general expressions which in practice must be taken with certain implications or limitations.

Thus[1] it is stated that money of the client coming into the possession of the lawyer should not be commingled with his private property or be used by him. This can hardly be meant to treat it as a breach of ethical obligation for an attorney of ample means, who receives a bank check in payment of a claim left with him for collection, to deposit it to his own credit in his own bank account, in order conveniently to deduct his own fees, remitting the balance promptly by his own check to the client. It would seem *in foro conscientiæ* (whatever might be the lawyer's liability, should the bank fail) that the client's consent to such a transaction would be fairly implied, even if there had been no previous dealings between them of a like nature. So the young lawyer who receives a five dollar bank note to apply on a claim for a hundred dollars can hardly be regarded as in the wrong, if he puts it for safe keeping in his own pocket-book, provided it be with the intention of paying over the sum due at the first reasonable opportunity, although it might not, and naturally would not, be so paid by the delivery of that particular bill.

Other articles must be read with some care, as a whole, in order to get at their true meaning.

Thus Article 27 declares that the "publication or circulation of ordinary simple business cards" is not *per se* improper, but that

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[1]Article 11.

"solicitation of business by circulars or advertisments" is unprofessional. Here "publication" would seem to include and certainly should include a publication in a newspaper of such a card as a paid advertisement. The distinction which it was intended to draw would appear to be that between advertising the fact that one is a lawyer and does business at a certain place or at certain hours, and an advertisement in which, besides this, business, or business of a certain kind, is solicited.

So Article 28, after declaring it to be disreputable for a lawyer to hunt up causes of action in favor of those who are ignorant of them, in order to obtain employment to bring suits; to be an ambulance-chaser; "or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital *attachés* or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services," proceeds to state that it is the duty of any member of the bar "having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred." Here the words "such practices" are apparently to be limited in their application to the last of the class of acts which have been censured; for disbarment would, except under extraordinary circumstances, seem to be too heavy a penalty for the others.

The canon regarding contingent fees was the only one amended in substance, by the Association, in dealing with the report of the Committee, and indeed it is not clear that this amendment changed anything but the form, so as to make plainer what was the intention of those who drafted it. In its present shape it seems to sanction, by implication, arrangements for contingent fees (when not contrary to the local law), provided their terms are reasonable; and its real emphasis is laid on the necessity of providing a prompt remedy for the client by the supervisory action of the court, if any unfair advantage of his necessities has been taken. Precisely how this supervisory action should be invoked was left to be decided by the local practice; and it would have been difficult to frame any form of procedure of universal application.

One question of professional obligation, as to which the practice at the English bar might be misleading, has been definitely and properly settled[2]: An American lawyer is free to decline

[2]By Article 31.

any retainer. There may be a reason for denying such a right to the English barrister. His retainer comes through the hands and at the instance of another legal practitioner, who presumably has satisfied himself that the action ought in justice to be brought or defended, as the case may be. To refuse to accept it would reflect on him. With us, where the client comes or can with propriety come directly to him whom he wishes to advocate his cause, such considerations of fraternity or professional etiquette have no place.

The committee had before it an important suggestion from Justice Brewer that a short body of rules should be prepared to be "given operative and binding force by legislation, or the action of the highest courts of the States," where that should be within their powers. It concluded not to urge such an endorsement of the code, as a whole, but, instead, drafted a form of oath to be taken on admission to the bar, which the Association by its action has now recommended "for adoption by the proper authorities in all the States and Territories." This form is mainly taken from that prescribed in the State of Washington, which was itself founded to a considerable extent on that in use in the Swiss Canton of Geneva. Both these, however, were subject to serious criticism in that they contained a pledge to counsel or maintain such proceedings only as should appear to the affiant to be just, except in the defence of one charged with crime. This forces the lawyer into the position of a Judge, before the case has been brought or heard. He must be satisfied that a suit or defence is just, before he can take the first step in court. The form recommended by the Association gives the provision in this respect a different turn. The affiant pledges himself not to counsel or maintain any suit or proceeding which shall appear to him to be unjust, nor any defence except such as he believes to be honestly debatable under the law of the land. The burden assumed as to actions is not to satisfy oneself that a suit is just, before bringing it, but not to bring it if satisfied that it is unjust—an obligation much less onerous; while as to defences it is enough if they seem to him honestly to present a question which, under the law, may be fairly made a subject of discussion on the trial. In both cases, the client has the benefit of the doubt.

This seems right. A lawyer should decline a retainer to accomplish what appears to him, after due consideration, to be a piece of injustice, but, if it does not so appear, that is, if after due

consideration he is not of the opinion that the cause or defence which he is asked to advocate is unjust, the question becomes one which ought to be decided by a court, after hearing both sides, if the party interested desires a judicial determination. The oath used in some of the Germanic States is framed upon similar lines.

In another point the Washington form has been changed to advantage. Following the ancient Geneva pattern, it pledged the affiant never to seek to mislead or deceive the Judge by any artifice or falsehood. This may have been sufficient in a country having no system of trials by a jury, but the committee, in view of the prevalence of that system here, properly added the words "or jury" after "Judge."

One addition to the form is of more doubtful merit, because it refers to a practice which can never be of common occurrence, while it would seem that a lawyer's oath of office should be confined to obligations of fundamental importance and general concern. This is a pledge that the affiant will accept no compensation in connection with a client's business, except from him or with his knowledge and approval.

Another addition taken from the ancient New England form, dating back to early colonial days, is a pledge not to delay any man's cause for lucre and malice. This, again, must be construed in view of what precedes it. If a client desires delay for a legitimate reason, to accept remuneration from him for securing it by taking advantage of some legal right can hardly be deemed reprehensible. To delay his client's cause, on the other hand, in order to increase his own fees, would be obviously wrong.

It might be too high praise to say that this code, as finally approved, could not have been made better. But the question for the American lawyer is not whether a more perfect one could be made. It is whether this code, having been framed after long deliberation and extensive correspondence by a capable committee representing all parts of the United States, and adopted with practical unanimity, after full opportunity for discussion, by the American Bar Association, ought not, as a whole, to receive his support.

If this code is accepted by the Bar Associations of every State, as a fair general statement of the main duties of members of the legal profession, a great purpose will be well accomplished. An authoritative criterion will be supplied, by which every lawyer can be safely guided, when he is in doubt as to the conduct he should

pursue in respect to any of the questions which oftenest prove a source of perplexity. The law student will have a mentor, always at hand. The courts will hesitate less in enforcing the discipline of the bar, since professional misconduct will be, more than ever before, a sinning against the light.

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ARISTOTLE ON LEGAL REDRESS.

In the course of my studies in ancient jurisprudence I was led to examine somewhat closely the interesting chapters devoted to the subject by Aristotle in Book V of the Nicomachean Ethics. I soon found that, although the passages in question had been the occasion of much ingenious interpretation on the part of editors and commentators, it was not altogether easy to find a thread which would lead one through the intricacies and pitfalls of the text. I should like to state some considerations which occurred to me in connection with the doctrine of so-called corrective justice, or legal redress: it is a matter which concerns jurists as well as philologists and philosophers.

I need not remind my readers of the fact that Aristotle's doctrine as to distributive and corrective justice (*τὸ διανεμητικόν* and *τὸ διορθωτικὸν δίκαιον*) has achieved great fame and played a most conspicuous part in the history of legal ideas. It may be sufficient to mention as an example of its far-reaching influence that it gave rise to important speculations of Grotius, who declined to measure distributive functions of Society by the standard of justice and restricted the application of the latter in a way characteristic of modern times to the reparation of infringed rights.[1]

I use the expressions "reparation of infringed rights," "redress of grievances," "legal redress," because it is clear from the whole exposition of Aristotle that in the case of what he calls "particular justice" (*ἡ ἐν τῷ μέρει δικαιοσύνη*) of which the *διορθωτικὸν δίκαιον* is one of the varieties, actual redress is meant and not merely a disposition or frame of mind suggesting reparation. The legal would in this case strictly correspond to the just, and the correspondence of *νόμιμον* and *δίκαιον* is mentioned in as many words in the introductory chapter of the treatise.[2] Although, therefore, for the purpose of translation the term *διορθωτικὸν δίκαιον* may be appropriately rendered as "corrective justice," we are justified, I think, in *interpreting* it as "legal redress in accordance with justice." The advantage of

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[1] Grotius, De jure belli ac pacis: Lib. 1, c. 1, § 8, de justitia expletrice et attributrice.

[2] Ethica Nicomachea, V, 1, 8, p. 1129 a, l. 34: *τὸ μὲν δίκαιον ἄρα τὸ νόμιμον καὶ τὸ ἴσον, τὸ δ' ἄδικον τὸ παράνομον καὶ τὸ ἄνισον.* Cf. § 12.

such an interpretation would be that it would place before us, instead of a very peculiar term, a designation common to different systems of law, and forming, as a matter of fact, the logical consequence of disturbed rights. *Legal redress* is one of the aspects of justice wherever it makes its appearance, but in various countries there will, of course, be material differences as to how far such redress has to stretch, what its delimitation from rules as to the distribution of rights or as to the action of the Commonwealth in propagating morality and public welfare ought to be. In any case it may not be useless to be reminded that we tread on ground occupied by jurisprudence and have to consider, not all kinds of possible interpretations, but those which fit best into recognized juridical distinctions.

Before proceeding to analyze the particulars of the Aristotelian teaching on legal redress, let us cast a glance at the *general arrangement* of the subjects with which our philosopher was dealing. It is easy to see that the teaching as to justice is subdivided into four sections. There is, to begin with, justice in general or justice universal (ἡ καθόλου δικαιοσύνη). There are, secondly and thirdly, the two species of justice in particular (ἐν μέρει), and there is, fourthly, fairness in voluntary exchanges, which does not amount to a special kind of justice,[3] but rather falls into the domain of fair economic intercourse. With the last section we need hardly concern ourselves except insomuch as it may serve to throw into relief some of the peculiarities of the third section. The second section or the first subdivision of the second genus, namely *distributive* justice, again, deals with the necessity for a community, not only to safeguard rights, but to allow and distribute them according to considerations of justice.[4] In regard to the first and third sections there seems to have been some misapprehension. The former has been sometimes understood as referring merely to justice as complete virtue, as a moral force outside concrete application in the courts,[5] while in the latter, investigators have often sought an answer to all questions bound up with the restoration of legal order. To use the words of Grant—

[3] Cf. in a different sense, Ritchie, Classical Review, VIII. pp. 185 ff.

[4] It may be also taken to mean justice in the actual distribution of goods or land by the State (*e. g.* Ἀθηναίων Πολιτεία, c. 21). But it is not my intention to go further into a discussion of this point in the present paper.

[5] *E. g.* E. Barker, The Political Thought of Plato and Aristotle, p. 322.

"The term corrective justice is in itself an unfortunate one, because it appears to lay down principles for restitution and therefore implies wrong. Thus it has a tendency to confine the view to involuntary transactions instead of stating what must be the principle of the just in all the dealings between man and man." [6]

On the other hand, an eminent Oxford commentator points out that

"even when an ordinary citizen injures another ordinary citizen, the true nature of the situation created is misrepresented by the term *συνάλλαγμα* (transaction) applied to it. We are not merely concerned with a relation between two individuals *in vacuo,* but with a sore in the body politic which must be healed by means which take into account the whole organism. *Διόρθωσις* is much more than making the *ἄδικῶν* give compensation to the *ἀδικούμενος,*—indeed it is sometimes impossible to compensate him at all."[7]

Now, I submit that the deliberate choice of the terms *διόρθωσις* and *συνάλλαγμα* is neither the product of casual and slovenly expression nor at variance with common-sense notions of justice, but rather characteristic of the way in which Aristotle arranges his material. The reaction of the Commonwealth against prohibited and noxious acts of citizens is mainly comprised under the heading of justice *universal* (I Section). The latter is said expressly to be directed to the maintenance of moral and social order as understood by the political authorities in the State.[8] All kinds of virtue and all sorts of vice may be prohibited and made punishable by the authorities from this point of view.[9] Indeed even precepts not necessarily moral may be made obligatory and enforced because the State declares them to be laws: one may have to seek justice by taking part in the cult of Brasidas in order not to infringe the law of

[6] Sir Alexander Grant, The Ethics of Aristotle, Illustrated with Essays and Notes: *vide* 4th ed., vol. II, p. 112, note on Eth. V, 4, 1, 1131 b.

[7] J. A. Stewart, Notes on Nicomachean Ethics: note, p. 434 in 1892 edition, on V, 4, 3, 1132 a, 2.

[8] Nic. Eth., ed. Bywater, V, 1, 13, 1129b, 14: *οἱ δὲ νόμοι ἀγορεύουσι περὶ ἁπάντων, στοχαζόμενοι ἢ τοῦ κοινῇ συμφέροντος πᾶσιν ἢ τοῖς ἀρίστοις ἢ τοῖς κυρίοις [κατ' ἀρετὴν] ἢ κατ' ἄλλον τινὰ τρόπον τοιοῦτον. ὥστε ἕνα μὲν τρόπον δίκαια λέγομεν τὰ ποιητικὰ καὶ φυλακτικὰ εὐδαιμονίας καὶ τῶν μορίων αὐτῆς τῇ πολιτικῇ κοινωνίᾳ.*

[9] *Ibid.* 1129 b, 19: *Προστάττει δ' ὁ νόμος καὶ τὰ τοῦ ἀνδρείου ἔργα ποιεῖν, οἷον μὴ λείπειν τὴν τάξιν μηδὲ φεύγειν μηδὲ ῥιπτεῖν τὰ ὅπλα, καὶ τὰ τοῦ σώφρονος, οἷον μὴ μοιχεύειν μηδ' ὑβρίζειν, καὶ τὰ τοῦ πράου, οἷον μὴ τύπτειν μηδὲ κακηγορεῖν, ὁμοίως δὲ καὶ κατὰ τὰς ἄλλας ἀρετὰς καὶ μοχθηρίας τὰ μὲν κελεύων τὰ δ' ἀπαγορεύων.*

Amphipolis.[10] This is a sufficient basis for the public side in law, and, in particular, for its criminal element. Law appears very properly, from this point of view, as a body of rules laid down by the Sovereign for the maintenance of a certain moral and social order. All transgressions against these rules are unjust and call forth the action of justice in the courts or intervention of executive officers. This is important to note in so far as it relieves the pressure on the second subdivision of particular justice, on its so-called "corrective" kind, in regard to criminal acts.

By allowing for this meaning of the first section one comes to understand that the relations of the third group, labelled as relations of corrective justice, are considered mainly from the point of view of legal redress, that is—of a restitution of rights or compensation for infringed rights which cannot be restored. This manner of approaching questions arising from unrighteous actions of one member of the community in regard to another is attended by marked difficulties, but it is logically possible, and, as a matter of fact, it was clearly taken up by Aristotle himself and by the actual law of Greek States. Infringements of right producing detrimental consequences for private interests could be considered and were often considered primarily as "private wrongs": compensation and punishment were welded together in such cases and punishment itself mostly took the shape of an increased compensation. We shall have to point out that it was so in actual law, but first let us turn to the exposition of Aristotle.

He goes the length of explaining that the redress or correction he means may arise out of voluntary transactions and out of delicts or involuntary transactions (*ἀκουσία συναλλάγματα*).[11] There is no reason for supposing that he wanted to speak under the first heading of any adjustment of contracts, say of sales or of leases, according to standards of supposed justice. In so far as fairness is concerned, he treats of it in the fourth section, but there is no indication of any idea corresponding to that expressed in modern Land acts,[12] unless

[10] Nic. Eth., V, 7, 1, 1134 b, 23.

[11] Cf. Dareste, La Science du Droit en Grèce, Paris, 1893, pp. 208 and 209. Also Beauchet, Histoire du Droit privé de la Republique athénienne, Paris, 1897, vol. IV, pp. 10 and 11.

[12] Cf. Stewart, Notes on Nicomachean Ethics: note, p. 432, on V, 4, 1, 1131 b, 25.

we are inclined to discover an allusion to something of the kind in the obscure remark that goods in exchange ought to be estimated before the transaction, because otherwise such transactions may turn out to be in every respect to the advantage of one party.[13] I will not dwell, however, on the possible interpretation of this passage in the sense of a desire for a tariff of fair prices. Aristotle takes it for granted that, as matters actually stand, the laws leave citizens free to seek their profit in concluding voluntary transactions.[14]

The only side from which corrective justice has to deal with sales, leases, exchanges, mortgages, debts, etc., is the side of redress. Obligations undertaken and not carried out have to be enforced, obligations undertaken under abnormal conditions, say under compulsion or in consequence of fraud, have to be rescinded, obligations misinterpreted by one of the parties have to be rightly formulated. These are clearly the consequences which any jurist will draw from the statement of the philosopher that the first duty of corrective justice is to deal with voluntary transactions such as sales, leases, mortgages, debts, etc.[15] It has to be added, unfortunately, that Aristotle does not further concern himself with this group and does not mention any examples of legal redress in connection with voluntary transactions—*i. e.*, contracts. We are left free to suppose that the subject seemed so obvious and simple to him that he did not care to illustrate it by express references to examples.

The matter was different in regard to involuntary transactions—the obligations *ex delicto* forming the main subject of the second subdivision. The transaction itself arises in this case from an act which was not meant to create an obligation, but amounted to an invasion of the plaintiff's right by the defendant, either with bad intention (*dolo*) or through negligence (*culpa*). This is why it may be appropriately styled, in respect to its origin, an involuntary transaction. It contains a certain penal element in consequence of the invasion of established

[13] Nic. Eth., V, 5, 12, 1133 b, 1 *et seq.*: *εἰς σχῆμα δ' ἀναλογίας οὐ δεῖ ἄγειν, ὅταν ἀλλάξωνται [εἰ δὲ μή, ἀμφοτέρας ἕξει τὰς ὑπεροχὰς τὸ ἕτερον ἄκρον], ἀλλ' ὅταν ἔχωσι τὰ αὑτῶν. οὕτως ἴσοι καὶ κοινωνοί, ὅτι αὕτη ἡ ἰσότης δύναται ἐπ αὑτῶν γίνεσθαι.*

[14] Nic. Eth., V, 4, 13, 1132 b, 15: *οἷον ἐν τῷ ὠνεῖσθαι καὶ πωλεῖν καὶ ἐν ὅσοις ἄλλοις ἄδειαν δέδωκεν ὁ νόμος.*

[15] Nic. Eth., V, 2, 12, 1130 b, 30: *τῆς δὲ κατὰ μέρος δικαιοσύνης καὶ τοῦ κατ' αὐτὴν δικαίου ἓν μέν ἐστιν εἶδος τὸ ἐν ταῖς διανομαῖς τιμῆς ἢ χρημάτων ἢ τῶν ἄλλων ὅσα μεριστὰ τοῖς κοινωνοῦσι τῆς πολιτείας (ἐν τούτοις γὰρ ἔστι καὶ ἄνισον ἔχειν καὶ ἴσον ἕτερον ἑτέρου), ἓν δὲ τὸ ἐν τοῖς συναλλάγμασι διορθωτικόν.*

right, and the question of making this element fit into the scheme of redress aiming at the satisfaction of the claim of the aggrieved party will necessarily be a delicate one. Let us notice, however, that in Greek law, and not only in Aristotle's jurisprudential statement, the matter is usually treated as one of redress complicated by penalties. Casual homicide, adultery, theft (in cases when the procedure *in flagranti* could not be applied), wounding, beating, bad language, as well as damages to property, were disposed of chiefly by private actions (*δίκαι κατὰ τινος*), although in certain cases the way to a public prosecution (*γραφή*) remained open.[16] In the action for damages, for instance, *δίκη βλάβης*, differences in regard to the infliction of penalties arose in consequence of directly recognized criminal intention.[17] In actions arising out of battery, the ordinary form of procedure was the *δίκη αἰκίας*,[18] although it might be turned into a *γραφή ὕβρεως*, an accusation *injuriarum* of a public and criminal kind.[19]

It is not without significance that in the Roman law of the prætors the tendency to treat delicts and obligations arising out of delicts on the basis of private actions is also very noticeable. The ordinary action for damages based on *quanti interest* was, of course, applied in cases when material losses had been occasioned by the unlawful action of the defendant. But a similar procedure was followed in the case of an *actio injuriarum æstimatoria,* that is—in cases when a penal element was clearly perceivable. The action *ex lege Aquilia de damno injuria dato* resolved itself into an estimation of the moral and material injury inflicted on the plaintiff, and we find that even in such egregiously criminal cases as those of casual homicide, of wounding, of corruption of daughters and sons in the power

[16] Meier, Schömann, and Lipsius, Der Attische Process, I, 202, ff. Cf. J. Cook Wilson, in Transactions of the Oxford Philological Society, 1887-1888, pp. 2-4.

[17] Pauly-Wissowa, Real-Encyklopädie der Klassischen Altertumswissen schaft, *sub voce*, Demosthenes v. Meidias, §§ 52 ff.

[18] Pauly-Wissowa, *sub voce.*

[19] Demosthenes, Ariston v. Conon, 1256, I, 5: *ἀπροσδοκήτως ἔλαχον αὐτῷ τὴν δίκην τῆς αἰκείας ταυτηνί. πάντων δὲ τῶν φίλων καὶ τῶν οἰκείων, οἷς συνεβουλευόμην, ἔνοχον μὲν φασκόντων αὐτὸν ἐκ τῶν πεπραγμένων εἶναι καὶ τῇ τῶν λωποδυτῶν ἀπαγωγῇ καὶ ταῖς τῆς ὕβρεως γραφαῖς, συμβουλευόντων δὲ μοι καὶ παραινούντων μὴ μείζω πράγματ' ἢ δυνήσομαι φέρειν ἐπάγεσθαι, μηδ' ὑπὲρ τὴν ἡλικίαν ὧν ἐπεπόνθειν ἐγκαλοῦντα φαίνεσθαι, οὕτως ἐποίησα καὶ δι' ἐκείνους ἰδίαν ἔλαχον δίκην, ἥδιστ' ἂν ὦ ἄνδρες Ἀθηναῖοι θανάτου κρίνας τοῦτον.*

of a *paterfamilias,* the matter was treated as one of damage on the strength of an enlarged interpretation of the *L. Aquilia.*[20] I will just quote as an example Paul's remark on the corruption of children.[21] My object in this apparent digression is to remind you that Aristotle had good reason to discuss involuntary transactions as matters of corrective justice or legal redress. In Greek and even in Roman law this point of view of redress of a grievance is chiefly insisted upon. Turning now to Aristotle's own teaching, we find that he employed a characteristic expedient in order to co-ordinate his treatment of corrective with that of distributive and with the wider range of universal justice. As justice seeks the equal and the mean (*τὸ ἴσον καὶ τὸ μέσον*) he makes all relations dependent on it resolve themselves into equations (*ἰσάζεσθαι*).

In distributive justice the equation is formed between the two halves of a geometrical proportion. Advantage stands to advantage in quantity as man stands to man in quality. But the justice of redress has also to be squared into an equation. In this case it arises from an arithmetical proportion, that is, it is produced by subtraction instead of division. The estate of the offender is conceived to be in excess of the mean by as much as the mean is in excess of the estate of the aggrieved person.[22]

Now, this formula together with some reflections on the mission of halving entrusted to the judge (*δικαστής*, from *δίχα*) has given occasion to Prof. Burnet to interpret Aristotle's view of corrective justice in the sense of an adjustment by which the loss of one party has to be added to the gain of the other and the sum has to be cut, as it were, in two.[23] It cannot have

[20] Grüber, Lex Aquilia, 199 ff.

[21] Dig., XI, 3, 14, § 1. De filio filiare familias corruptis huic edicto locus non est, quia servi corrupti constituta actio est, qui in patrimonio nostro esset, et pauperiorem se factum esse dominus probare potest dignitate et fama domus integra manente; sed utilis competit officio judicis æstimanda, quoniam interest nostra, animum liberorum nostrum non corrumpi.

[22] Nic. Eth., V, 4, 8, 1132 a, 27: *ὅταν δὲ δίχα διαιρεθῇ τὸ ὅλον, τότε φασὶν ἔχειν τὸ αὑτοῦ ὅταν λάβωσι τὸ ἴσον. τὸ δ' ἴσον μέσον ἐστὶ τῆς μείζονος καὶ ἐλάττονος κατὰ τὴν ἀριθμητικὴν ἀναλογίαν. διὰ τοῦτο καὶ ὀνομάζεται δίκαιον, ὅτι δίχα ἔστιν, ὥσπερ ἂν εἴ τις εἴποι δίχαιον, καὶ ὁ δικαστὴς διχαστής. ἐπὰν γὰρ δύο ἴσων ἀφαιρεθῇ ἀπὸ θατέρου, πρὸς θάτερον δὲ προστεθῇ, δυσὶ τούτοις ὑπερέχει θάτερον. εἰ γὰρ ἀφῃρέθη μέν, μὴ προσετέθη δέ, ἑνὶ ἂν μόνον ὑπερεῖχεν. τοῦ μέσου ἄρα ἑνί, καὶ τὸ μέσον, οὗ ἀφῃρέθη, ἑνί.*

[23] The Ethics of Aristotle, edited with an introduction and notes, by John Burnet, 1900. *Vide* notes on V (E) 4, 3, 1132 a, 4; V, 4, 4, 1132 a, 9; V, 4, 10, 1132 a, 32.

been Aristotle's meaning, argues Burnet, to dwell at length on the mere carrying over of the gain (κέρδος) on the side of the loss (ζημία) in order to compensate the material deficiency. This might, perhaps, have served the purpose in the case of voluntary transactions, but not in the case of delicts, in which loss and gain are not strictly commensurate, and the gain comprises, usually, much more than the actual damage incurred, because it represents also the wrongful assumption of authority, the element of criminality, the infringement of public order, etc. Thus we are again puzzled by penal accretions *ex delicto.* Such an interpretation could hardly be accepted in its direct setting. Apart from the vague character of the supposed precept of halving the aggregate of gain and loss, how could this operation be performed in practice, and are there any traces of it in the records of actual Greek legislation? Surely there ought to be, because it is one thing to notice that Aristotle has made use of a false etymology and an entirely different one to suppose that he presented a formula out of keeping with facts. As a matter of practice, the judges did not divide loss and gain by halves, which would have been impossible and unfair, but simply voted for the estimation of wrong and damage which seemed to fit the case best. The notion of halves is suggested by the necessity of re-establishing equality and has to draw its meaning from the latter.

Now the equality from which relations start and to which they have to revert in this case can only apply to a *personal equation.* The estates of plaintiff and defendant which have to be equalized are not the quantities of their fortunes. It would have been strange indeed if the illustration of the process in V, 4, 12, starting from the idea that there is a medium to which the losing and the gaining parties have to be reduced, applied to goods. There is no such medium in point of quantity between private fortunes, and the equality disturbed by the involuntary transaction is distinctly stated to be an equality as between citizens.[24] This view of the relation makes it easier to understand in what sense gain and loss are meant and what the taking away of κέρδος and the making up of the ζημία are intended to effect. The loss, ζημία, comprises evidently all the

[24] Nic. Eth., V, 4, 3, 1132 a, 2: *οὐδὲν γὰρ διαφέρει, εἰ ἐπιεικὴς φαῦλον ἀπεστέρησεν ἢ φαῦλος ἐπιεικῆ, οὐδ' εἰ ἐμοίχευσεν ἐπιεικὴς ἢ φαῦλος. ἀλλὰ πρὸς τοῦ βλάβους τὴν διαφορὰν μόνον βλέπει ὁ νόμος, καὶ χρῆται ὡς ἴσοις, εἰ ὁ μὲν ἀδικεῖ ὁ δ' ἀδικεῖται, καὶ εἰ ἔβλαψεν ὁ δὲ βέβλαπται.*

disadvantages, moral as well as material, to the aggrieved person which follow on the action of the offending party. The pain caused by a blow, the moral shock occasioned by it, the feeling of humiliation, the discredit thrown on the sufferer in the eyes of the public, all these elements have to be estimated in order to form a conception as to the loss sustained. Isocrates' oration against Lochites gives an example of the reckoning up of such moral *imponderabilia*.[25] The well-known occurrence mentioned by Gellius (XX, 1) as the cause of the change of the law as to blows in Rome throws light on the difficulty of treating such cases from the purely penal point of view.[26]

The meaning of the change in the Roman law as to battery evidently was that the rowdy millionaire indulging in the luxury of treating his countrymen like dogs had, as it were, big cheques ready to satisfy their pretensions. Should any one of them have stood on his right and brought an action against him, the penalty would have been the result of an estimation, a *τίμησις* and not the application of a common fine. One can even well imagine that a clever accuser speaking *κατὰ τινος* on such an occasion would take his stand on the fact that the compensation ought to be commensurable, not only to the loss of the aggrieved person, but also to the gain of the offender, who evidently derived great satisfaction from the fact that he could set at naught the laws of his country and deal at pleasure with his fellow-citizens without troubling much about the corresponding

[25] Isocrates. ΚΑΤΑ ΛΟΧΙΤΟΥ, 396 c and ff., ed. Blass, II, p. 235: *Ἐγὼ δ' εἰ μὲν μηδεμία προσῆν ὕβρις τοῖς πεπραγμένοις, οὐκ ἄν ποτ' εἰσῆλθον εἰς ὑμᾶς. νῦν δ' οὐχ ὑπὲρ τῆς ἄλλης βλάβης τῆς ἐκ τῶν πληγῶν γενομένης ἀλλ' ὑπὲρ τῆς αἰκίας καὶ τῆς ἀτιμίας ἥκω παρ' αὐτοῦ δίκην ληψόμενος, ὑπέρ ὧν προσήκει τοῖς ἐλευθέροις μάλισ' ὀργίζεσθαι καὶ μεγίστης τυγχάνειν τιμωρίας. ὁρῶ δ' ὑμᾶς, ὅταν του καταγνῶθ' ἱεροσυλίαν ἢ κλοπὴν, οὐ πρὸς τὸ μέγεθος ὧν ἂν λάβωσι τὴν τίμησιν ποιουμένους ἀλλ' ὁμοίως ἁπάντων θάνατον καταγιγνώσκοντας, καὶ νομίζοντας δίκαιον εἶναι τοὺς τοῖς αὐτοῖς ἔργοις ἐπιχειροῦντας ταῖς αὐταῖς ζημίαις κολάζεσθαι. χρὴ τοίνον καὶ περὶ τῶν ὑβριζόντων τὴν αὐτὴν γνώμην ἔχειν, καὶ μὴ τοῦτο σκοπεῖν. εἰ μὴ σφόδρα συνέκοψαν, ἀλλ' εἰ τὸν νόμον παρέβησαν, μηδ' ὑπὲρ τοῦ συντυχόντος, μόνον αλλ' ὑπὲρ ἅπαντος τοῦ τρόπου δίκην παρ' αὐτῶν λαμβάνειν*, etc.

[26] Gellius, Noctes Atticæ, XX, 1, 13: Lucius Veratius fuit, egregie homo improbus atque immani vecordia. Is pro delectamento habebat, os hominis liberi manus suæ palma verberare. Eum servus sequebatur crumenam plenam assium portitans; ut quemque depalmaverat, numerari statim secundum duodecim tabulas, viginti et quinque asses jubebat. Propeterea, inquit, 'prætores postea hanc abolescere et relinqui censuerunt; injuriisque æstimandis recuperatores se daturos edixerunt.'

Something similar to the L. Veratius anecdote is reported from later Greece.

loss in money. I do not want to make an argument of such a supposition, but it seems appropriate to illustrate the *subjective* coloring of the fines, on one hand, the ultimate equalization of gain and loss, on the other.[27] If we take up our standpoint on the valuation of the *ζημία*, the grievance or loss, we shall have to treat it as corresponding to the extent of gain which accrued to the offender, although this is not strictly true, but only called forth by the procedure of carrying over a supposed excess to cover a supposed loss. In the same way, should we start from an estimation of gain in the sense of the material and moral advantage derived from the wrong, these considerations will eventually appear as an inverted estimate of a loss to be compensated, although, as a matter of fact, the loss incurred may have been of an entirely different kind. Nor is it impossible to try to draw up a certain balance of claims based on considerations from both sides, and this would perhaps be the nearest approach to a realization of Prof. Burnet's hypothesis. Anyhow, what is not conjectural is the fact that legal redress was treated in Greek law as the result of compensation on the basis of complex estimates, and this fact affords the best justification for Aristotle's teaching on the subject, which seems so unmodern and therefore obscure to us.

The whole procedure is bound to appear even more strange when we take into account the means by which such valuations were carried out in practice. The Roman procedure in such cases was a simple and reasonable one. The magistrate, a *judex* or a couple of *recuperatores,* inquired into the damage done, made an expert valuation of the wrong in all its bearings, and a decision was given accordingly by the Court.[28] If we had only Aristotle's account before us in regard to Greek procedure in such cases, we might have thought that in Greece, too, the judge, the *δικαστής*, proceeded to estimate the complex elements of the disturbed relation and to formulate the amount of compensation. But there is little in Greek law to support such a view. The nearest approach to an impartial verdict on the strength of expert appreciation is indicated by Plato in his

[27] Nic. Eth., V, 4, 4, 1132 a, 9: *Ἀλλὰ πειρᾶται τῇ ζημίᾳ ἰσάζειν, ἀφαιρῶν τοῦ κέρδους.*

[28] Mommsen, Römisches Strafrecht, 803, 804.

Laws in the case of disputes as to the infringement of agrarian rights.[29]

As Plato's positions in the Laws are generally based on some actual rules used in Doric or other States, we may suppose that this particular instance also points to practices which may have existed somewhere in the wide region occupied by Greek Commonwealths. But it is impossible to locate these practices definitely. In most cases about which we are accurately informed the τίμησις was effected by a decision based on two alternatives laid down by the parties to the trial. It was so in Athens, about which we know most, but there is evidence of the same kind of procedure in Sparta, in Crete and in Ephesos.[30] All the authorities agree that this mode of estimating compensation was suggested and rendered necessary by the procedure taking place before large bodies of judges in the popular tribunals, two hundred and one or four hundred and one, according to the magnitude of the suit—in the Athenian Heliaia. It is characteristic in this connection that even in Rome when actions for *injuriæ* were carried before the judicial consilium instituted by the *Lex Cornelia injuriarum* the method of alternative estimates was adopted.

The consideration making for fairness in such cases was expressed by Aristotle in a passage of his Politics.[31] When jurors have to make up their mind about matters admitting of shades of opinion it is impossible to leave them free to give vent to all the varieties of possible disagreement. Let them choose between clear alternatives set before them. There is no breach of the oath to select the one which is nearer to your view and to reject the one which swerves further from it.

But why does Aristotle speak of the power of the δικαστής to adjust differences between the contending parties? Have we to take his expressions in a vague way, as applying merely to the settlement effected by a judicial decision, irrespectively of the method by which the decision has been obtained?

[29] Leges, VIII, 844: *ἐὰν δὲ ἐκ Διὸς ὕδατα γιγνόμενα, τὸν ἐπάνω γεωργοῦντα ἢ καὶ ὁμότοιχον οἰκοῦντα τῶν ὑπωκάτω βλάπτῃ τις, μὴ διδοὺς ἐκροήν, ἢ τοὐναντίον ὁ ἐπάνω μεθιεὶς εἰκῇ τὰ ῥεύματα βλάπτῃ τὸν κάτω. καὶ περὶ ταῦτα μὴ ἐθέλωσι διὰ ταῦτα κοινωνεῖν ἀλλήλοις, ἐν ἄστει μὲν ἀστυνόμον, ἐν ἀγρῷ δὲ ἀγρονόμον ἐπάγων ὁ βουλόμενος ταξάσθω, τί χρὴ ποιεῖν ἑκάτερον. ὁ δὲ μὴ εμμένων ἐν τῇ τάξει, φθόνου θ' ἅμα καὶ δυσκόλου, ψυχῆς, ὑπεχέτω δίκην, καὶ ὅφλων διπλάσιον τὸ βλάβος ἀποτινέτω τῷ βλαφθέντι, μὴ ἐθελήσας τοῖς ἄρχουσι πείσθεσθαι.* (Bekker's Text.)

[30] Mitteis, Reichsrecht und Volksrecht, 70.

[31] Pol. II, 8, §§ 13-15, p. 1268 b.

Hardly. The passage in the Ethics speaks of the δικαστής in the singular and dwells on his character as a mediator (μεσίδιος) and on the supposed derivation of his very name from a process of cutting into halves (διχάζειν). It seems possible to suppose that in this case Aristotle had only in view the technical juror of the Athenian dicasterion, as is taken for granted by Prof. H. Jackson in his translation of Book V. The singular in the text points to the general office of the judicature in all its kinds and varieties. This being so, I should be inclined to include the action of the διαιτητής. To be sure, Aristotle draws the line sharply in some respects between the δικαστής (judge) and the διαιτητής (arbiter). For this there is good reason, and nobody doubts, of course, that the jurisdiction of arbiters has to be distinguished technically from that of *ex officio* judges. But in a sense the public διαιτηταί of Athens were entrusted with very important functions in regard to the trial of cases turning on private claims. In small trials up to ten drachmæ the forty, the successors of the δικασταὶ κατὰ δήμους, estimated claims and decided on them. In more important controversies the public arbiters (διαιτηταί) had to investigate the matter. Their investigation was a regular and necessary part of the procedure. They were seized of the case by the forty, examined evidence, held views, gave decisions, and it was only on an appeal that the decisions of public arbiters were sent up for revision to the dicasteria.[32] Even at that stage the procedure was restricted to an examination of the evidence produced before the arbiters, of the laws applied by them and of the decision as formulated by them.[33] This means that in cases of damages and personal wrongs the ground for the decision was thoroughly prepared by the preliminary procedure before the arbiters; their valuation must have supplied the frame for the alternative questions to be put to the jurors. A curious illustration of the importance of the inquiry of the arbiter as a preliminary to the action before the dicasteria may be found in Demosthenes' speech for Ariston against Conon.[34] In fact, there is no reason to suppose that Aristotle entirely disregarded the common course of procedure in the case of damages and wrongs

[32] Meier, Schömann and Lipsius, Attischer Process, 986.

[33] Ath. Pol. (ed. Venyon, Berlin, 1903) c. 53.

[34] Demosthenes, Ariston v. Conon, c. 29, p. 1266: ἐπειδή γ' ἀνεστηκὼς ἤδη προσεκαλεσάμην αὐτόν, ἐν τῇ πρώτῃ συνόδῳ πρὸς τῷ διαιτητῇ παραδιδοὺς ἐφαίνετ' ἄν. ὧν οὐδὲν πέπρακται τούτῳ. Cf. cc, 26, 27.

which must have afforded everyday examples of the action of the judge as a mediator.

Altogether, the treatment of legal redress in Book V, although certainly much obscured by the shortness of the account, by puzzling mathematical analogies, by the unsatisfactory state of the text and by the even more unsatisfactory manner in which the lectures of the philosopher were reported, is not at variance with the actual practice of Greek law and affords interesting material for the discussion of a system of legal redress based on the reduction of moral claims to material estimates.

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PROPER USE OF THE WRIT OF INJUNCTION—FROM THE STANDPOINT OF LEGAL HISTORY.

According to the theory of the English Constitution the King is the fountain of justice and general conservator of the peace of the Kingdom. In the early days of the Norman Conquest he actually sat at the time in the *Aula Regis*. This cumbrous and peripatetic court soon became unequal to the administration of justice and out of it were evolved the Common Pleas, the Exchequer and the King's Bench. It seems somewhat surprising that this latter Court, the residuum, so to speak, of the *Aula Regis,* should not have taken upon itself the duty of administering justice in all its phases and should not have assumed the equity jurisdiction possessed and sometimes exercised by that venerable tribunal. To the narrow-mindedness of the judges and their lack of power of initiative is, no doubt, attributable the fact that it did not. It could only take cognizance of a suit after there had issued out of the Chancery an original writ in the King's name, framed according to a prescribed form. This constituted the commission in accordance with which it proceeded to determine the matter. The jurisdiction thus assumed by or conferred upon the King's Bench being so limited, there was left a large residuum of wrongs unredressed. Petitions were being constantly preferred to the King as the fountain of justice, or to his select council, in respect of matters unprovided for. These petitions were often referred for decision to the Chancellor, who had become an officer of great consideration, and who being an ecclesiastic, versed in the civil law, was regarded as the best person to dispose of them. The references were at first special, but Edward III by a writ or ordinance referred all such matters as were of grace to be despatched by the Chancellor or by the Keeper of the Privy Seal. The establishment of the Court of Chancery as a Court of Equity is generally considered, says Spence, to have been mainly attributable to this or some similar ordinance.[1]

The matters regarded as of grace were, in the first place, those that appealed to the equity and conscience of the Chancellor, such as matters of fraud, trust, mistake, &c.—matters of which the prætor had taken cognizance many centuries before. His jurisdiction in this class of cases seems never to have been seriously disputed by the common law judges. The precedents show that they often sanctioned and approved the relief he gave. But he

[1]Spence, Eq. Juris. of Ct. Chan., Vol. I, p. 338.

went further. The disorders of the times were such that the weak were powerless to secure justice through the ordinary channels, and the Chancellor was appealed to for relief in cases of violence and outrage. With the good will and assistance of an enterprising monarch desirous of curbing the turbulent nobility, he was no doubt able, in some instances, to deserve the panegyric composed in favor of the Bishop of Ely, Chancellor to Richard I:—

> *Si quid obest populo, vel moribus est inimicum,*
> *Quicquid id est, per eum desinit esse nocens.*

The jurisdiction which he assumed in these matters was, in a measure, criminal and it ceased in the time of Elizabeth, when the ordinary tribunals had become able to render equal justice to all. The Chancellor also undertook to restrain and otherwise interfere with the proceedings of the law courts. This part of the jurisdiction, though necessary, if justice was to be done, was always resisted by the common law judges and culminated in the famous controversy between Lord Coke and Lord Ellesmere, which was resolved in favor of the latter. The precise point there settled was

"that the Chancellor had the jurisdiction which he had exercised to examine the judgments of the Courts of Common law and to stay execution, if he should find that they had been obtained by fraud for which the Courts of Common Law could not afford sufficient remedy."

Where equity and law are administered by separate tribunals this jurisdiction has, to a certain extent, continued to the present day. The jurisdiction to restrain crime has been long since disclaimed. So complete is the refusal of the English equity judges to interfere in matters criminal that in *Prudential Assurance Co.* v. *Knott*[2] it was held that the Court had no jurisdiction to restrain the publication of a libel, even if injurious to property.[3] It is by no means true, however, that if the act sought to be enjoined is or may be criminal, Equity will withhold its aid. This is decided in *In re Debs.*[4] There, interstate commerce and the carrying of the mails were obstructed and the property employed therein was threatened with destruction by the lawless acts of strikers. It was

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[2](1874) L. R. 10 Ch. App. Cas. 142.

[3]In view of the language of the Judicature Act of 1873, which gives in the broadest terms the right to restrain the committal of any wrongful act (see Jessel's comment in Beddow *v.* Beddow (1878) L. R. 9 Ch. Div. 89, at 92), it might be open to question, at least, whether a case containing similar facts would be decided in the same way now. Thorley's Cattle Food Co. *v.* Massam (1880) L. R. 14 Ch. Div. 763; Thomas *v.* Williams (1880) L. R. 14 Ch. Div. 864.

[4](1894) 158 U. S. 564.

a case of irreparable injury, not merely to individuals and corporations but also to the United States, which had a special property in the mails while under their care. Mr. Justice Brewer said:[5]

"Again it is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This as a general proposition is unquestioned. A Chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature, but when such interferences appear, the jurisdiction of a court of equity arises and is not destroyed by the fact that they are accompanied by, or are themselves violations of the criminal law."

The distinction is manifestly between a mandate not to inflict irreparable injury to property, or property rights, and a mandate not to commit criminal acts done in the course of inflicting such injury. The distinction is not one peculiar to the Debs' case. It runs through the whole range of equity proceedings. A partner is, by mandatory injunction, required to deliver over the property and books of the firm to a receiver. Instead of that he destroys them. A trustee is directed to pay money into court. Instead of doing so, he embezzles it. The jurisdiction of the Court to issue its injunction would certainly not be taken away by an allegation in the bill that these acts are threatened.

The right to issue writs of injunction is co-extensive with the right to give relief in matters of equitable cognizance. Equity acts only *in personam*, except in so far as some statute may have given other effect to its decrees. Its injunction, preventive or mandatory, is one of its means, if not its chief means of enforcing them. It is, in fact, a species of execution. The origin of the writ is not far to seek. From the thirteenth century down, the study of the civil law was vigorously prosecuted by the clergy and in it the Chancellor, almost always an ecclesiastic, found a body of principles adapted to guide him in his effort to supplement the defects and soften the rigor of the common law as then expounded. Among other things he found the *Interdict,* which is thus defined in the Institutes:

*"Erant autem Interdicta formæ atque conceptiones verborum, quibus prætor aut iugebat aliquid fieri aut fieri prohibebat. * * * Prohibitoria sunt, quibus vetat aliquid fieri; veluti vim sine vitio possidenti, vel mortuum inferenti, quo ei ius erat inferendi, vel in loco sacro ædificari, vel in flumine publico ripave eius aliquid fieri,*

[5]At p. 593.

quo peius navigetur. Restitutoria sunt, quibus restituti aliquid iubet."[6]

This is the very definition of an injunction to be found in our own books:

"A judicial process whereby a party is required to do a particular thing or to refrain from doing a particular thing according to the exigency of the writ."

When it issues after final hearing to enforce the decree, it is as I have said, obviously, in the nature of an execution. As Eden says, in the endless variety of cases cognizable in equity, if the relief to which the plaintiff is entitled consists in restraining the commission or the continuance of some act, equity administers it by means of this writ.

But the writ is more than a writ of execution. It may issue at the beginning or during the progress of a cause. Its function then is to maintain the *status quo* or to preserve the subject-matter of the litigation until the controversy is finally decided. It will occasionally issue where the controversy is legal and not equitable. Prevention is better than cure. A remedy that prevents injury to one's property rights is better than one which awards damages for their violation. Theoretically, every one will concede this, but practically, difficulties have arisen, which have called forth pretty strong statements by eminent judges. Thus, Judge Baldwin in *Bonaparte* v. *C. & A. R. R. Co.*[7] says:

"There is no power, the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or is more dangerous in a doubtful case, than the issuing an injunction."

And Lord Cottenham, in *Brown* v. *Newall*,[8] says:

"I have always felt, and since I have been upon the bench, I have seen no reason to alter my opinion, that extreme danger attends the exercise of this part of the jurisdiction of the court, and that it is a jurisdiction to be exercised with extreme caution."

The reason is evident: In these interlocutory applications, the Court is generally obliged to act on *ex parte* affidavits, that, if they do not positively mistake the facts, often give a very inadequate view of them. So impressed have been the English equity judges with the necessity of discouraging one-sided statement that they hold that if the *ex parte* presentation of the case has not been fair,

[6] Inst. Lib. 4. tit. 15.
[7] (1830) 1 Bald. Cir. R. 205, at 217.
[8] (1837) 2 M. & C. 558, at 570.

they will dismiss the application without regard to its merits. Says Wigram, *V. C.*, in *Castelli* v. *Cook*:[9]

"The rule, as I understand it, is this: A plaintiff applying *ex parte* comes (as it has been expressed) under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that and the Court finds when the other party applies to dismiss the injunction that any material fact has been suppressed or not properly brought forward, the plaintiff is told the Court will not decide on the merits and that as he has broken faith with the Court, the injunction must go" (*i. e.*, be dissolved).

The duty imposed upon the judge to whom the application is made is one that involves care and caution. He must protect and preserve the alleged right of the plaintiff, but he must also guard the right of the defendant as well. A temporary injunction may answer the purposes of an unscrupulous applicant as well as a perpetual one.

Much the best means of protecting a defendant is to give him notice, even if it be only a few hours' notice—unless the giving of it would be likely to defeat the purpose of the application: that is, might itself precipitate the impairment or destruction of the right which the plaintiff is seeking to have protected. Thus, if defendant threatens to cut down my ornamental shade tree or to put an imitation of my label upon his goods, or to pirate my manuscript, it is evident that an unscrupulous suitor may, if he have notice, hasten to act before he is stopped by the service of the writ. In cases like these, any system of jurisprudence that did not provide some means of preventing an injury, would be very defective.

In cases of this sort therefore the Court must protect the defendant in some other way. It does so (1) by not going beyond the exigencies of the then situation, even if it be probable that on final hearing a larger measure of relief will be accorded; (2) by imposing terms. So flexible is equity procedure that these terms can always be made to fit the particular case. An undertaking or bond may be exacted with or without sureties. The judge may require an account to be kept, or money to be paid into court. On the other hand, if the Court feels that by imposing terms on the *defendant* the plaintiff will be secured, in the event of the suit's being determined in his favor, and the defendant is willing to accede to these terms, an injunction will not issue. The defendant may, moreover, be required to do such acts or execute or remove such works, or enter into such undertaking as the Court may direct.[10]

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[9](1849) 7 Ha. 89, at 94.
[10]Keer, Injunctions (3rd Ed.) 27.

Another safeguard is the requisition of a special affidavit containing a statement of the material facts, verified by the oath of some person who has personal knowledge of them.[11] The cases in which the plaintiff is allowed to verify his bill by swearing as to his belief are few, and those occur only where in the nature of things positive proof cannot be expected.

Again, the Court will not grant an injunction on the theory that it will do the defendant no harm, if he has not done, or does not intend to do the act complained of; nor where there is unexpected delay, nor where the conduct of the plaintiff is not fair, *i. e.*, not free from all taint of fraud or illegality.

The defendant's right being carefully and properly safeguarded in one or more of the ways above mentioned, it would be difficult to assert that the injunction *pendente lite* is not a necessity in any modern system.

To sum up: Unless statutes have prescribed otherwise, injunctions issue only where the controversy concerns property, or property rights, including, of course, contract rights; and not always then. For some property and some property rights receive in the courts of law what is deemed adequate protection. Where such protection is afforded, equity does not interfere, except in the few instances where it is necessary to preserve the *status quo,* and the court in which the legal contest is pending, for some reason, cannot give the needed protection.

Where the assistance of equity is invoked there may indeed be a question whether the subject-matter of the controversy is a property right or a contract right requiring equitable protection. Thus, there may be a question whether a man has a property right in his own features. If it be held that he has not the Court will not enjoin.[12] If it be held that he has[13] then the Court will. But this and similar questions are not really questions of injunction but of substantive right. If the right be established, the injunction goes as a matter of course and upon the principle upon which it issues in other cases.

FREDERICK W. STEVENS.

MORRISTOWN, N. J.

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[11]Youngblood *v.* Schamp (N. J. 1862) 2 McCarter 42.
[12]Roberson *v.* Rochester Folding Box Co. (1902) 171 N. Y. 538.
[13]Edison *v.* Edison Polyform Man. Co. (N. J. 1907) 67 Atl. 392.

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NOTES.

THE FIDUCIARY RELATION OF A PROMOTER—A promoter bears a fiduciary relation both to the corporation and to the subscriber. As regards the corporation his position of advantage in dealing therewith creates this relation. 1 Morawetz, Priv. Corp. §545. His duty is to disclose the facts of such transactions in behalf of the corporation as it may adopt. *Yale Gas Stove Co.* v. *Wilcox* (1894) 64 Conn. 101. There is, however, no obligation to disclose dealings made before he became a promoter. *McElhenny's Appeal* (1869) 61 Penn. St. 188. The remedies open to a corporation for a breach of this obligation are rescission, or a suit in equity to recover the secret profits. *Cortes Co.* v. *Thannhauser* (1891) 45 Fed. 730.

Among cases in which a corporation has sought to recover profits made by promoters from a sale of property, clearly the sale may be avoided or secret profits recovered if the majority stockholders without knowledge of the facts adopted the transaction. Even though the majority knew the facts, if their action be not *bona fide* the corporation can recover by a minority stockholder's suit. *Hebgen* v. *Koeffler* (1897) 97 Wis. 313. But the promoters are not liable where they constitute the sole stockholders during

the life of the corporation, *Salomon* v. *Salomon & Co.* [1897] L. R. App. Cas. 22, or where, having organized and taken property with the view of continuing sole stockholders, after a considerable interval of time issue new stock to the public. *In re British etc. Box Co.* (1881) L. R. 17 Ch. Div. 467. Fraud cannot be predicated of such a dealing. Midway, lie two groups of cases. First, the promoters or their dummies become incorporators or directors of the newly formed corporation, make the sale before complete organization, and then call for subscriptions from outsiders. Here they have generally been held liable. *Hayward* v. *Leeson* (1900) 176 Mass. 310; *Erlanger* v. *New Sombrero etc. Co.* (1878) L. R. 3 App. Cas. 1218. Second, the promoters, having designedly issued a few shares of stock to themselves, adopt the sale, and immediately offer the remainder to the public. In a case of the latter sort the United States Supreme Court has recently held, contrary to the view in England, *Society of Practical Knowledge* v. *Abbott* (1840) 2 Beav. 559; (*semble*), *In re British etc. Co.* (1881) L. R. 17 Ch. Div. 467, and in Massachusetts on the same facts, *Old Dominion etc. Co.* v. *Bigelow* (1905) 188 Mass. 315, that the corporation has no remedy. *Old Dominion Copper Mining and Smelting Co.* v. *Lewisohn* (1908) 28 Sup. Ct. Rep. 634. The decision stands on the ground that, since all the stockholders for the time being knew the facts, their unanimous act cannot be a fraud upon the corporation. The court properly distinguishes on its facts *Erlanger* v. *New Sombrero etc. Co., supra,* (belonging to the first group), though its reasoning would undoubtedly cover the principal case.

Two other courses were open to the court. In the first, the court would be called upon to exaggerate the accepted distinction between the corporate entity and its stockholders. It was suggested in *Society of Practical Knowledge* v. *Abbott, supra,* and argued in *Salomon* v. *Salomon & Co., supra,* that the corporation is an entity so distinct, that it may be defrauded by the unanimous act of its stockholders. Hence, for a fraud upon the corporate interests, a new stockholder, like a minority stockholder, could sue in the name of the corporation. The argument is specious in assuming the interests of the corporation distinct from those of its stockholders. No court, it is believed, is prepared to go to this extent. It would lead to inextricable difficulties in the determination of the corporate interests, and to the result, rejected in *Salomon* v. *Salomon & Co., supra,* that the receiver of a corporation, whose stock was exclusively owned by the promoters during the entire life of the corporation, could recover profits made by them in a sale of their property to the corporation.

The court might more properly have looked beneath the technical distinction between the first and second groups of cases, and, viewing the transactions as in essence the same, have administered equitable relief. Cf. *Erlanger* v. *New Sombrero etc. Co., supra.* This apparently is the underlying basis of the Massachusetts decision. But that court professed to adopt the business view that the real corporation was one composed of the contemplated stockholders and that the knowledge of the promoter before the completion of such a corporation was not the knowledge of the entity. This theory, however, is logically open to criticism, and is unnecessary to support the true *ratio decidendi.* It might also, perhaps, be

argued that, under the circumstances of the principal case, the corporate interests should be determined by the interests of the contemplated stockholders as well as by those of the present stockholders. This would be a modification of the extreme entity theory, and perhaps represents the view of the English Court of Appeals in *In re British etc. Box Co., supra,* holding that an issue of stock to the public directly after the adoption of the transaction would be conclusive evidence of fraud on the corporation. It could hardly be regretted had the Supreme Court, exercising its equitable powers, brushed aside its technical argument and allowed the corporation relief.

It is probable, however, that, on the facts of the case, the subscribers had an individual remedy against the promoters. Though in most cases in which personal relief has been given the subscriber, the facts show misrepresentation, the broad ground of decision is that the promoter does not treat with the subscriber at arm's length, but in a fiduciary relation by virtue of which the promoter is bound to disclose all the facts. *Brewster* v. *Hatch* (1890) 122 N. Y. 349; *Teachout* v. *Van Hosen* (1888) 76 Ia. 113. The duty of the promoter to the subscriber is based upon the confidence the latter is likely to repose in the organizer of a corporation. 1 Morawetz, Priv. Corp. §545. That duty should therefore continue so long as he in effect acts in such a capacity, and should exist in the principal case, despite the fact that the promoter had also become a stockholder. If this be true, the refusal of the Supreme Court to relax sound legal theory in order to grant an additional remedy, may be supported.

State Policy and the Full Faith and Credit Clause.—At the period of the Revolution, the doctrine with respect to the effect of foreign judgments *in personam* was unsettled both in England and on the Continent. Black, Judgments (2nd Ed.) Ch. 21, Pt. 2, *passim*. In the American colonies, the same uncertainty existed, *M'Elmoyle* v. *Cohen* (1839) 13 Pet. 312, and it was to promote comity and good will between the states, by enforcing respectful treatment of the acts and judicial proceedings of sister states, that Art. IV., Sec. 3 of the Articles of Confederation was adopted. See *People* v. *Dawell* (1872) 25 Mich. 247, 259. But the clause proved ineffectual; it neither declared what effect such acts should have, nor gave Congress power to legislate with respect thereto. *M'Elmoyle* v. *Cohen, supra.* These defects were eliminated by Art. IV., Sec. 1 of the Constitution, authorizing Congress to prescribe the method of proving sister state judgments and the effect thereof, and by act of Congress, May 26th, 1790, U. S. Comp. Stat. (1901), 677, declaring that "the said records and judicial proceedings * * * shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken."

The decisions involving a construction of Art. IV., Sec. 1, and the Act of 1790 have been remarkably consistent from the beginning. One of the earliest is *Armstrong* v. *Carson's Executors* (1794) 2 Dall. 302. A plea of *nil debent* to a judgment of a sister state was held bad, the court declaring that "if the plea would be bad in the courts of New Jersey, it is bad here." To the same effect are *Mills* v. *Duryee* (1813) 7 Cranch 481, and *Hampton*

v. *M'Connel* (1818) 3 Wheat. 234. In the former, Marshall C. J. asserted that if a judgment in the court which renders it "has the faith and credit of evidence of the highest nature, viz. *record evidence,* it must have the same faith and credit in every other court. * * * And we can perceive no rational interpretation of the Act of Congress unless it declares a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision." From this interpretation the U. S. Supreme Court has never departed. *Green* v. *Van Buskirk* (1868) 7 Wall. 139, 147; *Hanley* v. *Donoghue* (1885) 116 U. S. 1; *Huntington* v. *Attrill* (1892) 146 U. S. 657, 684.

But Art. IV., Sec. 1 does not forbid an investigation into the jurisdiction of the court of a sister state over the parties and the subject matter, *D'Arcy* v. *Ketchum* (1850) 11 How. 165; *Renaud* v. *Abbott* (1885) 116 U. S. 277, and as to those facts upon which the jurisdiction is based, the court of another state may directly contradict the recitals in the foreign judgment. *Thompson v. Whitman* (1873) 18 Wall. 457. Moreover, Art. IV., Sec. 1 does not prohibit a state from legislating upon the remedy in suits upon the judgments of other states, *Wood* v. *Watkinson* (1846) 17 Conn. 500, 509; *Bank of Alabama* v. *Dalton* (1850) 9 How. 522, provided such legislation is not unreasonable or too stringent. *Christmas v. Russell* (1866) 5 Wall. 290, 305. Furthermore, since the courts of one state do not enforce the penal laws of another state, the courts of the former may look behind the judgment to discover the nature of the original demand. *Wisconsin* v. *Pelican Ins. Co.* (1887) 127 U. S. 265. Nor is it an infringement of Art. IV, Sec. 1 to forbid a citizen by a bill in equity to take advantage of judicial proceedings which he is prosecuting in another state. The state, in such a case, is merely acting *in personam,* and does not thereby discredit the judgment or proceedings of the other state. *Cole* v. *Cunningham* (1889) 133 U. S. 107.

But, with the exception of cases involving jurisdiction or the enforcement of penal laws, it seems beyond controversy that the judgments of one state are binding upon the courts of a sister state. A recent decision of the U. S. Supreme Court, not without the vigorous dissent of four justices, refuses to modify this interpretation. *Fauntleroy* v. *Lum* (1908) 28 Sup. Ct. Rep. 641. The plaintiff, a citizen of Mississippi, obtained in Missouri a judgment against the defendant, also a citizen of Mississippi, on a contract in cotton futures entered into in the latter state, and prohibited by its laws. The Missouri court had jurisdiction, but failed to admit evidence of the Mississippi law. The Supreme Court held that, since the Missouri court had jurisdiction, its judgment was conclusive not only in Missouri but in Mississippi.

White, J., in the minority opinion, contended that the illegality of the original cause of action in Mississippi should preclude a recovery on the Missouri judgment, since, to hold otherwise, would deprive a state of the power to enforce its local police regulations. This view is apparently suggested in part by certain *dicta* in *Andrews* v. *Andrews* (1902) 188 U. S. 14, to the effect that each state has the inherent right to make and enforce its own rules of policy; but the decision turned solely on jurisdiction, as in all cases involving the validity of sister state divorces. It is well recog-

nized in international law that judgments of *foreign* courts lacking jurisdiction, *Rose* v. *Himely* (1818) 4 Cranch 241, and penal judgments, *The Antelope* (1825) 10 Wheat. 66, 123, are not enforcible under the rules of comity. The exception is also well established that a sovereign state is not bound by comity to recognize judgments of a foreign state repugnant to its own policies. See Westlake, Priv. Internat. Law (3rd Ed.), 39, citing Ital. Code, Prel. Art. 12, and the Code Napoléon, Art. 6; *Vincent et Pénaud, Dict. de Droit Internat. Privé, Jugement Etranger, Titre II. Ch. II. Sec. 5*, and cases cited. See also Wharton, Confl. Laws (2nd Ed.) §656. The minority seems to argue that, since the first two exceptions apply to the full faith and credit clause, it is reasonable to suppose that the framers of the Constitution had the third also in mind. A judgment rendered without jurisdiction, however, is not a real exception to Art. IV., Sec. 1, since a judgment so rendered is not properly a judgment at all. *Rose* v. *Himely, supra.* It is also to be noted that, though foreign judgments may be impeached for fraud, Westlake, *supra*, 354, and cases cited, the judgments of sister states may not be. *Simmons* v. *Saul* (1890) 138 U. S. 439, 459; *Mooney* v. *Hinds* (1894) 160 Mass. 469. Hence it can hardly be assumed that the full faith and credit clause was enacted subject to all exceptions to the rules of comity. The purpose of the framers of the Constitution must be sought elsewhere. As pointed out above, that purpose was to avoid uncertainty as to the effect of sister state judgments and the bitterness incident thereto. It is believed that the doctrine of the minority would reintroduce the very evils sought to be eliminated, which the judicial interpretation of Art. IV., Sec. 1, and the act of 1790 has hitherto rendered impossible. That state policy must bow to the constitutional provision, even if the result is an evasion of the local law, has been conceded by state courts from the beginning. *Medway* v. *Needham* (1819) 16 Mass. 157; *Ross* v. *Ross* (1880) 129 Mass. 243; *Van Voorhis* v. *Brintnall* (1881) 86 N. Y. 18.

THE VENDEE'S LIEN AFTER RESCISSION OF THE CONTRACT OF SALE.—The vendee's lien for the purchase money paid and the vendor's lien for the purchase money due are loosely said to be similar, and in several respects this is true. The same equitable consideration that impelled chancery to grant the vendor relief accorded the vendee his remedy, whether the added importance which equity attached to transactions in realty, or the failure of the common law to provide execution against real property. The remedies are similar also in operation, i. e., they are equitable charges against the *res* for payment of money. An attempt has, indeed, been made in the case of *Rose* v. *Watson* (1864) 10 H. L. C. 671, to explain the vendee's lien as a species of trust. It was said in that case that each payment transfers in equity a corresponding portion of the estate, and the vendor becomes trustee of that portion. It is, however, at the time the contract of sale is entered into that the vendor becomes a trustee of land, and payment is unnecessary to the creation of this trust. *Lane* v. *Ludlow* (1825-30) 2 Paine 591. The vendee's method to enforce this trust is by suit for specific performance, not by enforcement of his lien. If the vendor is already trustee of all the land, part payment cannot make him doubly a

trustee of a portion thereof. So also the vendor's lien has been said to be a constructive trust arising from the unconscientiousness of the vendee. *Shall v. Biscoe* (1856) 18 Ark. 149. This theory is well met by Gray, C. J., in *Ahrend* v. *Odiorne* (1875) 118 Mass. 261. The better theory seems to be that these liens are not estates in the land, but mere charges upon it. See Pomeroy Eq. Jur. §1234, note.

While alike in these respects, the vendor's and vendee's liens differ in that they are bestowed to protect essentially distinct rights. Equitable liens had their origin in contracts express and implied in fact. Pomeroy Eq. Jur. §1234. They have been extended to cover certain classes of contracts implied in law. Thus, where one joint tenant puts necessary improvements on the land held jointly, equity imposes the quasi-contractual obligation on the land. *Alexander* v. *Elliston* (1880) 79 Ky. 148. Equity has, indeed, gone further than the law and imposes liens where the law implies no contract, e. g., liens for improvements innocently placed on another's land. *Bright v. Boyd* (1841) 1 Story 478. In the main, however, it may be said that equitable liens are given to protect contractual and quasi-contractual obligations. The vendor's lien is given to secure money expressly agreed upon to be paid. Equity merely grants an additional remedy upon the obligation to pay in the contract of sale. Obviously the enforcement of that remedy does not terminate the contract, the vendee still being liable for a deficiency on the re-sale. *Ex parte Seaworth* (1812) 19 Ves. Jr. 234. The vendor's lien, therefore, has its basis in the contract of sale and is incident thereto. The vendee's lien, on the other hand, is given to secure a money return never contemplated by the original agreement and inconsistent therewith. When the vendor fails to make a good title there is a contract implied in law for the return of the purchase money paid. *Flight* v. *Booth* (N. C. 1834) 1 Bing. 370. It is on this quasi-contractual obligation, it is submitted, that the vendee's lien rests. It is independent of the original contract, and is lost if the vendee affirms that contract and obtains damages for its breach, even though the damages include the part payments. 2 Williams, Vendor and Purchaser 969; *Cornwall* v. *Henson* (1900) 2 Ch. 298.

This distinction was apparently overlooked by the majority in a case recently decided by the New York Court of Appeals, where it was held, three justices dissenting, that a vendee who asks for the rescission of the contract of sale on the ground of fraud is not entitled to a lien for the purchase money paid. *Davis* v. *Rosenzweig Realty Co.* (1908) 84 N. E. 943. The court was apparently influenced in their decision by the theory before mentioned, advanced in *Rose* v. *Watson* (1864) 10 H. L. C. 671, considering the lien to be incident to the original contract of sale. In a case decided at the same time the court declared a lien in favor of a vendee seeking the return of purchase money on failure of title. *Elterman* v. *Hyman* (1908) 84 N. E. 937. The two cases seem inconsistent. When a plaintiff sues for money had and received, or takes advantage of any of the quasi-contractual forms of action which the law allows on a failure of consideration, he elects to treat the original contract as at an end. *Ehrensperger* v. *Anderson* (1848) 3 Ex. 147. Thus, if he obtains judgment in a general assumpsit action, he cannot thereafter bring special assumpsit, since he is bound by

his election to treat the original contract as at an end, *Goodman* v. *Pocock* (1850) 15 Q. B. 576, and, if he elects to sue in general assumpsit, he must return all benefits received under the original contract. *Miner* v. *Bradley* (Mass. 1839) 22 Pick. 457. Hence it follows that, when a vendee enforces his lien, he thereby repudiates the contract of sale, and his position in regard to such contract is the same whether or not he asks for a rescission thereof. If, moreover, the lien is conferred to protect a quasi-contractual right, it is immaterial whether that right is based on fraud or failure of consideration. It has frequently been held that where a married woman refuses to complete title, the vendee has a lien, although the contract was void *ab initiò, Pilcher v. Smith* (Tenn. 1858) 2 Head. 208; *Pierson v. Lum* (1874) 25 N. J. Eq. 390; but see *Ewing* v. *Osbaldiston* (1837) 2 M. & C. 53, and other courts have not hesitated to declare a lien in cases similar to the principal case. *Davis* v. *Heard* (1870) 44 Miss. 50; *Cooper* v. *Merritt* (1875) 30 Ark. 686; and see *Mycock* v. *Beatson* (1879) L. R. 13 Ch. Div. 384. The result reached by the dissenting opinion accords with the better reasoning and, as well, with the spirit underlying equitable relief.

THE RULE IN SHELLEY'S CASE APPLIED TO PERSONALTY.—The Supreme Court of Delaware has recently refused to extend the operation of the rule in Shelley's Case, as many courts profess to have done, to gifts of personal property, on the ground that the extension would be against both reason and authority. *Jones* v. *Rees* (Del. 1908) 69 Atl. 785. The latter proposition, with few exceptions outside of Delaware, is doubtful; the former seems not to have been closely examined by the courts.

The rule in Shelley's Case, as an inflexible rule of property applicable to the attempted creation of estates under a certain form of words, 7 COLUMBIA LAW REVIEW 550, was doubtless originally a protective rule of feudal tenure to eliminate one of the many means devised to defraud the lord of the incidents of seigniory. *Van Grutten* v. *Foxwell* [1897] L. R. App. Cas. 658. Hence there is no historical reason for its application to personalty. Moreover, to have a gift of chattels such that the rule might operate strictly by way of analogy, would require that the words "to A for life, remainder to his administrators, executors and assigns," be used, not "remainder to his heirs." *Bennett* v. *Bennett* (1905) 217 Ill. 434. Yet it is always the latter case that arises. There was no technical rule at common law that the word "heirs" might not be used in disposing personalty as a word of purchase, *Powell* v. *Boggis* (1866) 35 Beav. 535, and no intimation appears in the earliest cases that the rule in Shelley's Case obtains in gifts of personalty. Thus, not only the word "issue" in a devise of a term for life, afterward to his issue, *Warman* v. *Seaman* (1676) Rep. Temp. Finch 279, but even the words "heirs of the body," which should have brought the bequest literally within the rule, were considered words of purchase. *Peacock* v. *Spooner* (1688, 90) 2 Vern. 43, 195. The question was purely one of the testator's intent. On the one hand, a devise of a term to a wife and after her death to the heirs of her body, was held to give an absolute estate to the wife, on the ground that the testator intended a gift to the wife in tail, "which could not be" in personalty. *Bray* v.

Buffield (1677) 2 Ch. Cas. 236. Similarly, in *Richards* v. *Bergavenny* (1694) 2 Vern. 324, a similar intention was found from the fact that the personalty was meant to go with realty given in tail. On the other hand, an assignment of a long term in trust for A for ninety-nine years, if he lived so long, then to his wife for life, remainder to the heirs of A begotten on his wife, did not go absolutely to the first taker, the creation of the short term out of the long one sufficiently showing the donor's intent not to assign the entire term to A. *Ward* v. *Bradley* (1687) 2 Vern. 24. The succeeding interval was broken only by *Dafforne* v. *Goodman* (1699) 2 Vern. 362, expressly following *Peacock v. Spooner, supra.*

Apparently, the first recorded instance of the application to personalty of the rule in Shelley's Case is *Webb* v. *Webb* (1710) 1 P. W. 132. Lord Harcourt decided that an assignment of a term in trust to A for life, remainder to his right heirs, with intervening remainders, vested the entire term in A, saying, "I never heard it said before *Peacock* v. *Spooner,* that the limitations of a term in equity differ from the case of a freehold at common law." The gift in this, as in the earlier cases, was of a chattel real, but the step was soon taken from chattels real to chattels personal. *Butterfield* v. *Butterfield* (1748) 1 Ves. 133, 155; *Garth* v. *Baldwin* (1755) 2 Ves. 646. Notwithstanding, it had been previously held by Lord Harwicke, who decided *Garth* v. *Baldwin, supra,* that the words "heirs of the body" could be words of purchase when such an intention appeared elsewhere. *Hodgeson v. Bussey* (1740) 2 Atk. 80; *accord, Hockley v. Mowbry* (1790) 3 B. C. C. 81; cf. *Knight* v. *Ellis* (1789) 2 B. C. C. 570.

At most, therefore, in England the rule in Shelley's Case as applied to personalty is a rule of construction, easily yielding to the apparent intention of the testator or donor. This, the strongest supporters of the rule in the United States readily admit, *Glover* v. *Condell* (1896) 163 Ill. 566; *Key's Estate* (1896) 4 Pa. Dist. 124; *Taylor* v. *Lindsay* (1888) 14 R. I. 518, only one being driven to protest along with such admission "that not to apply the rule to personalty is to prostrate one of the great landmarks of property." *Horne* v. *Lyeth* (Md. 1818) 4 Harr. & J. 431. This result may be attributed in part to the fact that to make the rule inflexible would more often defeat the intention of the testator than in the case of realty, a consequence which equity strains to avoid. *Knight* v. *Ellis, supra.* Indeed, most cases cited in support of the rule merely sustain the principle that personalty cannot be entailed. *Gross* v. *Sheeler* (Del. 1885) 7 Houst. 280. In England, the cases in point seem limited to instances where the words would create an entail in realty. The words in the bequest are construed in terms of realty, and then, if by the operation of the rule in Shelley's Case, an estate tail would have been created, the absolute interest in the personalty is given. In the United States its operation has been extended to words that would create a fee simple in realty. Cf. *Horne* v. *Lyeth, supra.* Peculiarly enough, in at least one state, the rule is still applied to personalty though the words would not vest the remainder in the ancestor in a case of realty because of the abrogation of the rule by statute. *Powell* v. *Brandon* (1852) 24 Miss. 343; cf. *Sands* v. *Trust Co.* (1907) 195 Mass. 575. A further difficulty encountered in the American cases arises where the courts failed to distinguish between a

proper application of the rule in Shelley's Case to discover an entail, and an analogous application of the rule against perpetuities where personalty is given over after the death of the first legatee without issue. Both rules have been indiscriminately termed the rule in Shelley's Case. *Glover v. Condell, supra; Mason* v. *Pate's Ex'r* (1859) 34 Ala. 379.

The decision of the Delaware court is commendable. It is not to be wondered that eminent judges have been puzzled to discern by what process the intention of a donor of personalty must be defeated by the operation of a rule which acts upon a remainder to the "heirs" of one who takes an estate of freehold, because of the technical meaning of that word when applied to real property. *Herrick v. Franklin* (1868) L. R. 6 Eq. 593; *Smith* v. *Butcher* (1878) L. R. 10 Ch. D. 113. It is curious, also, that courts of equity should have felt bound to follow, at least to an extent, an arbitrary rule of real property at common law, when sustaining interests in chattels unknown to the common law.

Proper Uses of a Highway Where the Fee is in the Abutting Owner.—The conflict between the common law, on the one hand, and the needs of a developed commercial society, on the other, has produced considerable confusion in the determination of the proper uses to which a highway may be put, where the fee is in the abutting owner. Undoubtedly, at common law, the right obtained by the public from the abutting owner was merely a right to pass and repass. 1 Ro. Abr. 392, B, 1, 2; *Goodlittle* v. *Alkar* (1757) 1 Burr. 133, 143. Apparently, this still remains the rule in England, *Goodson* v. *Richardson* (1874) L. R. 9 Ch. App. 221; *Galbreath* v. *Armour* (1845) 4 Bell. App. Cas. 374, where there is no need of modification since a new burden may be imposed by Parliament. The Massachusetts courts early succumbed to the demand for new highway uses. *City of Boston* v. *Richardson* (1866) 13 Allen 146, 159-161. It is said that the abutting owner dedicated the highway for all uses adding to the public convenience and for all purposes of intercommunication. *Pierce* v. *Drew* (1883) 136 Mass. 75; *Sears* v. *Croker* (1904) 94 Mass. 586. This doctrine has been followed in other jurisdictions, *Cater* v. *N. W. etc. Tel. Co.* (1895) 60 Minn. 539; *Briggs* v. *Lewiston etc. R.R.* (1887) 96 Me. 363; *People* v. *Eaton* (1894) 100 Mich. 208, but has not met with general favor. Elliott, Roads & Streets (2nd Ed.) 764-5. Two criticisms may be suggested: first, that it amounts to an implication in law of an intention in the dedicator which doubtless had no existence in fact; second, that the logical application of the rule deprives the abutter of all enjoyment of the fee. These courts, however, forced to admit that a consistent application would produce hardship, have been compelled to modify it to the extent of holding that a steam railroad is an additional burden on the fee. *Carli* v. *Stillwater* (1881) 28 Minn. 373.

A majority of courts, however, have sought a more equal balance of the conflicting interests. The cases may be separated into two classes: first, those in which it is attempted to devote the highway to new forms of travel; second, those in which it is sought to establish new uses not connected with passing and repassing. New York, as illustrated by a recent decision,

Duncan v. *Nassau Elec. R. R. Co.* (1908) 111 N. Y. Supp. 210, has taken a stand against the overwhelming weight of authority, Elliott, Roads and Streets (2nd Ed.) p. 755, n. 1, in holding that a street railway, included within the first class, is not a proper exercise of the right of passage, since there is a permanent appropriation of a part of the abutter's fee. *Craig* v. *Rochester R. R. Co.* (1868) 39 N. Y. 404; *Eels* v. *A. T. & T. Co.* (1894) 143 N. Y. 133, 140. Arguments favoring the contrary view seem founded upon no solid basis. It is believed that, from the standpoint of policy, the interests of the corporation do not outweigh the common law right of the abutter. That the legislative authorization amounts to the appointment of an agent to improve the highway, *Craig* v. *Rochester R.R. Co., supra,* dissenting opinion, is answered by the rule that only such improvements can be made as add to the highway's more beneficial enjoyment by all methods of travel. Cf. *Muhlker* v. *New York & Harlem R.R. Co.* (1904) 197 U. S. 544; *Sauer* v. *New York etc. R.R. Co.* (1906) 205 U. S. 526; but see *Wolfe* v. *Covington etc. R.R. Co.* (Ky. 1854) 15 B. Mon. 404. As pointed out by a well-known text writer, Lewis, Em. Dom. §115, i, if one track may be laid, innumerable may follow, thus excluding all other methods of travel. The courts opposed to the New York view, finding it necessary to limit the application of their doctrine that a street railway is not an additional burden, *Hinchman* v. *Patterson Horse R. Co.* (1864) 17 N. J. Eq. 75, attempt to distinguish between such a use and that by a commercial railroad. Elliott, Roads & Streets (2nd Ed.) 697. The difference in motive power, it is generally agreed, is immaterial. *Williams v. City El. Co.* (1896) 41 Fed. 556. That local traffic is not thereby aided seems of no consequence, for roads as a means of passage, are established for all inhabitants of the state. *Hodgdon* v. *Haverill* (1907) 193 Mass. 406, 410. If the carriage of freight is the ground of distinction, it may be answered that the highway was never exclusively limited to the transportation of passengers. *Montgomery* v. *Santa Anna etc. Co.* (1894) 104 Cal. 186; *Mordhurst* v. *Fort Wayne* (1904) 3 St. Ry. R. 182; *contra, Wilder* v. *Aurora etc. Tract. Co.* (1905) 16 Ill. 497. The same criticisms may be made of the subtler distinctions as to an electric railway connecting distant points and carrying light freight. *Abbott* v. *Milwaukee Tract. Co.* (1906) 126 Wis. 634, 4 L. R. A. N. S. 202 n. It is, therefore, suggested that the New York doctrine, affording a test easy of application, is more acceptable from the standpoint both of logic and practicability.

Though a highway exists primarily for purposes of travel, it may now, concededly, be devoted to other purposes of a public nature. Lewis, Em. Dom. §126. From the analogy to the right of the public to build drains, always considered a proper exercise of the power to improve, the erection of sewers was early held to create no additional burden on the fee. *Cone* v. *Hartford* (1859) 28 Conn. 363; *Kelsey* v. *King* (1860) 62 Barb. 410. Similarly, the laying of water mains or gas pipes is considered a proper highway use. *Witcher* v. *Holland Water Works Co.* (1893) 66 Hun 619; *McDevit* v. *People's Nat. Gas Co.* (1894) 160 Pa. St. 367. These secondary uses, however, are improper if they interfere with the primary right of passage. Though extending the common law, they are justifiable because of the vital public necessity for proper sanitation and protection. On the

one hand, they indirectly improve the highway as a means of travel since it is thereby drained, lighted, etc. On the other, they afford the abutting owner an incidental benefit of material value. Both elements, it is conceived, are essential to make the use a proper one. Thus the stringing of telephone wires, though of incidental benefit to the abutter, would be improper, for it in no way affects the public interest. 4 Harv. L. Rev. 240. Conversely, a use beneficial to the public would impose a new burden if the abutter received no incidental benefit. Thus a sewer built, not for the benefit of the abutting owners of the highway through which it passes, but for those of a nearby town, is not a proper use of the highway. *Van Brunt* v. *Flatbush* (1891) 128 N. Y. 50. It is only upon the latter rule that the distinction between the servitudes to which urban and rural highways may be subjected, can be supported. To say that the uses of a highway vary according as the highway is situated in the city or in the open country is hardly supportable. Most urban streets were originally rural roads. The mere change of surroundings cannot be deemed to have increased the purposes for which the abutting owner dedicated the highway. Lewis, Em. Dom. 91, c. Clearly, it may be added, uses neither required by considerations of a public nature nor affording benefit to the abutter are an additional burden on the fee. *Eels* v. *A. T. & T. Co., supra.*

Waiver of the Right to Trial by Twelve Jurors in Criminal Actions. —The United States Circuit Court of Appeals, First Circuit, has recently held (Aldrich, J., dissenting) that the guaranty in the Federal Constitution of trial of crimes by jury is something which the accused has no power to waive; and that the jury contemplated is a body of twelve. *Dickinson* v. *U. S.* (1908) 159 Fed. 801. Accordingly, contrary to a ruling of Chief Justice Shaw on similar facts, *Com.* v. *Dailey* (1853) 12 Cush. 80, a verdict of conviction rendered by ten jurors was set aside, notwithstanding the defendant's agreement upon the discharge of the two jurors that the trial, already well under way, should continue with unimpaired force, and although the offense, while an "infamous crime," see *Ex parte Wilson* (1885) 114 U. S. 417, was a misdemeanor only.

Whether a person accused of a crime within the constitutional guaranty, see *Callan* v. *Wilson* (1887) 127 U. S. 540; *Schick* v. *U. S.* (1904) 195 U. S. 65, can legally consent to trial by a judge alone or with less than twelve jurors is almost a new Federal question; but it has arisen often under State Constitutions, and with inharmonious results. This disagreement is due to the existence of three distinct conceptions of the guaranty itself. *Per* Mitchell, J., in *State* v. *Woodling* (1893) 53 Minn. 142. According to the first view, it is a privilege intended merely for the benefit of the accused, *State* v. *Sackett* (1888) 39 Minn. 69, like other Constitutional guaranties which concededly may be waived, e. g., the right to a jury in civil suits, *U. S.* v. *Rathbone* (1835) 2 Paine 578, trial in the county where the crime was committed, *Dula* v. *State* (Tenn. 1835) 8 Yerg. 511, and the right to be confronted by the State's witnesses. *State* v. *Polson* (1870) 29 Ia. 133. Where the provision for the trial of crimes by jury occurs in the "bill of rights", cf. *Edwards* v. *State* (1883) 45 N. J. L. 419, or its

language is expressive of a privilege (e. g. "the accused shall enjoy the right, etc.," or even perhaps, "the right shall remain inviolate" or "shall be preserved"), this first conception may be correct, see *State* v. *Worden* (1878) 46 Conn. 349; but not, it would seem, where the provision is in that part of the Constitution which deals with the frame-work of government (e. g. Art. III, §2, clause 3 of the Federal Constitution), or its terms are mandatory. See *State* v. *Holt* (1884) 90 N. C. 749. The second view regards the guaranty of trial of crimes by jury as one in which the State also has an interest, for the due protection of the accused. *Cancemi* v. *People* (1858) 18 N. Y. 128; *Hill* v. *People* (1868) 16 Mich. 351. That the State by accepting a plea of guilty constantly does permit the omission of this safeguard is not, as often urged, a valid criticism; for the ancient practice of allowing pleas of guilt must have been in the minds of the Constitution framers. A more serious objection is presented by the fact that the accused is permitted to reject other constitutional safeguards, seemingly as vital. Thus he is vouchsafed an impartial trial, yet bias in a juror may be waived. It may be answered however that the jury system, as the supreme safeguard, is in a separate category. This argument, it is submitted, seems accordant with the attitude of the common law, and it has especial force wherever the language of the provision for trial of crimes by jury, in contrast with that of provisions for safeguards, deemed dispensable. is unmistakably mandatory. The third theory is that the presence of twelve jurors is essential to the jurisdiction of the Court. *Harris* v. *People* (1889) 128 Ill. 585; *Bell* v. *State* (1870) 44 Ala. 393. Herein lies the vice of the dissenting opinion in the principal case. The Court is competent to proceed to judgment on a plea of guilty, cf. *State* v. *Almy* (1892) 67 N. H. 274, because such a plea leaves nothing for the jury to perform. *West* v. *Gammon* (1899) 98 Fed. 426. But the plea "not guilty" at once raises issues of fact the determination of which is the exclusive function of the jury, and this jury, at least up to the adoption of the Federal Constitution, consisted of twelve. Cf. *Carpenter* v. *State* (Miss. 1839) 4 How. 163. It follows that in the absence of a statute conferring jurisdiction, the Court alone or with a panel of less than twelve jurors, is a tribunal unknown to the law. See Cooley, Const. Lim. (7th Ed.) 456-9. Statutes have been passed in some states, and held constitutional, remedying this jurisdictional defect. *In re Staff* (1885) 63 Wis. 285; *Brewster* v. *People* (1899) 183 Ill. 143. But where the second view of the nature of the guaranty of jury trial of crimes obtains, such a statute ought not to be sustained.

The minority in the principal case attempts a distinction, apparently recognized in Iowa, between a case where the trial started with a complete panel, later diminished, and one not so begun. Contrast *State* v. *Kaufman* (1879) 51 Ia. 578 and *State* v. *Carman* (1884) 63 Ia. 130. The accidental character of the former situation and the disadvantages, to State and the accused alike, of a mistrial, are persuasive considerations; but both cases involve the same jurisdictional infirmity. This answer should be applied also to the suggestion that in respect to waiver of trial by twelve jurors felonies are distinguishable from misdemeanors; and although waiver has been allowed more often in misdemeanor cases, the validity of such a distinction has been properly denied. *In re McQuown* (Okl. 1907) 91 Pac.

689, 692. True, the Supreme Court, in *Thompson* v. *Utah* (1898) 170 U. S. 343, held that a person accused of felony could not authorize a jury of eight, whereas in *Schick* v. *U. S., supra,* it decided, in terms, that a jury might be "waived" in petty misdemeanors. But the *Schick* case actually decided, it is submitted, only that the right to a jury trial for such offenses did not in fact exist.

The *Schick* case does, however, appear to lend some sanction to the position taken by Aldrich, J., in the principal case; for Brewer, J., speaking for the Court, cites *Com.* v. *Dailey, supra,* approvingly, and Harlan, J., stood alone in his contention that as no crime, however trivial, was summarily triable by a magistrate at common law except under Act of Parliament, the appellant, in the absence of a statute conferring the requisite jurisdiction, had not been convicted by a legally constituted tribunal. Moreover, whereas in *Hopt* v. *Utah* (1884) 110 U. S. 574 it was unanimously held that the accused had no power to waive a statutory right to be present during his entire trial, more recently, in *Queenan* v. *Oklahoma* (1902) 190 U. S. 548, a juror's disqualification, appearing in the course of the trial but waived by the accused, was declared, unanimously, not to vitiate the verdict. This apparent growing disposition against technical defenses might lead the Supreme Court to follow *Com.* v. *Dailey, supra.* But in the absence of authority that at common law, in misdeameanor cases triable by jury, a verdict could be rendered by less than twelve jurors, the principal case is logically sound. And it is even doubtful that a Federal statute authorizing consent to a reduction of the panel ought to stand if passed, in view of the position and the peremptory language of Art. III, §3, clause 2 of the Constitution: "The trial of all crimes shall be by jury." Cf. *Bank* v. *Okley* (1819) 4 Wheat. 235, 244.

Proof of Dangerous Tendency by Evidence of Prior Effect.—The dissenting opinion in a recent New York case illustrates a reactionary tendency which has already assumed considerable proportions. The majority held that evidence of a prior accident in a passageway through an elevator shaft was admissible, to indicate the dangerous character of the place. Two justices maintained that, since it was not shown that the defendant knew of the former accident, the testimony was incompetent. *Cefola* v. *Siegel-Cooper Co.* (1908) 111 N. Y. Supp. 1112.

Where such knowledge of dangerous tendency or quality is possessed by the individual charged with responsibility, evidence of the accidents whether one or many, through which this knowledge was derived, is uniformly admitted. Clearly, it gives rise to an inevitable inference of negligence. *City of Chicago* v. *Powers* (1866) 42 Ill. 169. But even where such notice and knowledge are lacking, proof of prior effect, it is submitted, is relevant. In order to investigate properly the merits of a given accident, it is not merely desirable, but material to determine the tendency, nature, and quality of the place or object involved. To determine these accurately, it is essential to apply the practical test of common experience. *Phelps* v. *R.R. Co.* (1887) 37 Minn. 487. Failure to realize the true evidentiary purpose and that negligence or due caution are, at best, merely indirect in-

ferences, has led to much of the confusion of the cases, which a neglect of two simple conditions of admissibility has not lessened.

In the first place, to make the evidence of prior effect *legally* relevant in an action where its present effect is at issue, an underlying similarity of conditions must be shown. *Aurora* v. *Brown* (1882) 12 Ill. App. 131; *Bailey* v. *Trumbull* (1863) 31 Conn. 581. In the absence of such proof, the evidence is of too indirect a character to be of practical probative value. *Sullivan* v. *D. & H. Canal Co.* (1900) 72 Vt. 353. Secondly, the more recent the evidence of injury at the given place, the more strongly does the presumption of a continued similar condition operate. Where the accident occurred at too distant a date, evidence of it has often been excluded, on the theory, seemingly, that while ordinarily it is merely the *weight* of the evidence which varies inversely as the remoteness increases, still, at a certain point the evidence itself becomes too unimportant to be legally material, *a fortiori,* competent. The conditions of modern trial by jury afford an explanation. Oftentimes these two grounds of exclusion are confused, but that there are two distinct inferences involved, is clear. Cf. *Gillrie* v. *Lockwood* (1890) 122 N. Y. 403. At what precise stage the exclusionary principles should operate is a question for the trial court to determine. (Thayer, Prel. Tr. Evid., 517: "In such cases it is a question of where lies the balance of practical advantage.") Necessarily, the question must be largely one of judicial discretion; but that, it is submitted, in no way justifies an inflexible rule of exclusion. *Bemis* v. *Temple* (1894) 162 Mass. 342, 4.

In the first American case in point, *Collins* v. *Dorchester* (Mass. 1850) 6 Cush. 396, an injury occurred on a highway through an alleged defect in a railing. The Massachusetts Supreme Court, speaking through Metcalf, J., denied that evidence that another person under like circumstances had recently suffered a similar accident was admissible. Coming from so distinguished a source, this ruling naturally influenced subsequent development, and, together with the case of *Temperance Hall Ass'n* v. *Giles* (1869) 33 N. J. L. 260, explains a long line of similar decisions. *Aldrich* v. *Pelham* (Mass. 1854) 1 Gray 510; *Parker* v. *Publishing Co.* (1879) 69 Me. 173, and cases cited. Either that the introduction of collateral events results in confusion of issues, or that the probative value is disproportionate to the incident expense of time, is the usual *ratio decidendi. Phillips* v. *Willow* (1887) 70 Wis. 6. If the two fundamental exclusionary principles, which have been indicated, are heeded, such consequences will rarely, if ever, be involved. It is far preferable to submit the proffered evidence to these preliminary tests than to adopt an invariable rule of exclusion which is not only illogical but unnecessary. The theory of *Collins* v. *Dorchester, supra,* reached its high water mark in *Martinez* v. *Planel* (1869) 36 Cal. 578. The attack on its underlying fallacies, beginning with *Darling* v. *Westmoreland* (1872) 52 N. H. 401, culminated in the New York leading case of *Quinlan v. Utica* (1877) 11 Hun 217, aff'd, 74 N. Y. 603. These cases squarely hold that in any investigation, legal or scientific, a knowledge of the nature of the place or object involved is essential and that to properly ascertain this, the test of experience must necessarily be employed. This has since been repeatedly recognized as a specific ground for admitting evidence of previous accidents, *Fordham* v. *Gouverneur* (1899) 160 N. Y.

541; *Taylorville* v. *Stafford* (1902) 196 Ill. 288, though in many rulings the identical evidence, in the light of surrounding circumstances, has been likewise held competent to indicate notice to the person charged with responsibility. *Stair* v. *Kane* (1907) 156 Fed. 100. Thus, prior accidents on a defective pavement may be admissible, not only to show that the common cause of the respective injuries possesses certain dangerous characteristics, but also to charge the municipal authorities with notice thereof. *District of Columbia* v. *Armes* (1882) 107 U. S. 519; *accord, Phelps* v. *R.R. Co., supra.* The two, however, are quite distinct.

The undeniable reactionary tendency in New York, revealed in the minority reasoning, is prevalent, also, at present, in a few other jurisdictions, and it is the more remarkable, perhaps, because of a recent liberal treatment of this evidence in Massachusetts itself. *Flaherty* v. *Powers* (1896) 167 Mass. 61; *Spaulding* v. *Lithograph etc. Co.* (1898) 171 Mass. 271. Such a reaction seems unfortunate. It might, however, be noticed that a total absence of proof of recency or of similarity of conditions seems to discredit the actual result reached by the majority.

RECENT DECISIONS.

NORMAN S. GOETZ, *Editor-in-Charge.*

AGENCY—KNOWLEDGE OF AGENT—NOTICE TO PRINCIPAL.—The president of a trust company, who was also the director of a bank, induced certain of his co-directors to execute a note, on condition that it would not be discounted until signed by all. He had the note discounted by the trust company without the additional signatures. *Held*, the trust company could recover, only such knowledge being imputed as the principal would have acquired acting personally. *Lanning* v. *Johnson* (N. J. 1908) 69 Atl. 490.

Notice to an agent acting within the scope of his authority is notice to the principal. This rule is based upon two theories; (a) the legal identity of principal and agent; (b) the duty of the agent to disclose pertinent facts, and the presumption that he will perform that duty. On the first theory, only such knowledge is imputable as the agent acquires during the actual negotiation, and the adverse interest of the agent does not prevent the imputation; *Bank of U. S.* v. *Davis* (N. Y. 1842) 2 Hill 451; while under the second, which is supported by the weight of authority, it is immaterial when the agent acquires the information, provided it may be presumed to be present in his mind at the time of the transaction; *Fairfield Savings Bank* v. *Chase* (1881) 72 Me. 226; but if the agent's interest is adverse, his knowledge may not be imputed. Mechem, Agency, §721, *Innerarity* v. *Merchants' National Bank* (1885) 139 Mass. 332. The rule applied in the principal case is not logically developed from either theory. Although grounded upon the first, the result reached is contrary to that which normally flows therefrom, since the adverse interest would be there immaterial, and while in its origin (*Sooy v. State* (1879) 41 N. J. 394) it expressly repudiates the underlying reason of the second, it here reaches a result which accords with the cases based upon that reason.

ATTACHMENT—EQUITABLE PROTECTION.—A, an attachment creditor, sought to set aside as fraudulent an assignment made to B by C, the defendant, in the attachment suit. *Held*, (two judges dissenting), equity could not grant relief. *Hart* v. *Clark & Co.* (1908) 111 N. Y. Supp. 888.

One who has levied under an attachment acquires a lien and is more than a creditor at large. *Kittredge* v. *Warren* (1844) 14 N. H. 509; Drake, Attachment §§224, 425; *contra, Ex parte Foster* (1842) 2 Story 131. Though the question is mooted, Pomeroy, Eq. Juris. §1415, the better view requires equity to set aside a fraudulent conveyance in aid of the attachment lien. *Boswick* v. *Blake* (1893) 45 Ill. 85; *Hahn* v. *Salmon* (1884) 20 Fed. 801; *Hunt* v. *Field* (N. J. 1852) 1 Stock. 36; *contra, Temment* v. *Battey* (1877) 18 Kan. 324. The New York courts, after irreconcilable decisions, cf. *Bates* v. *Plonsky* (1882) 28 Hun 112; *Falconer* v. *Freeman* (1847) 4 Sandf. 565; *Bowe* v. *Arnold* (1883) 31 Hun 256, have rejected this doctrine. *Whitney* v. *Davis* (1896) 148 N. Y. 256. The argument that an attachment creditor should be denied relief because equity will aid only a judgment creditor with an execution returned unsatisfied, *Griffin* v. *Nitcher* (1869) 57 Me. 270; *Martin* v. *Michael* (1856) 23 Mo. 50, rests upon a misconception. The rule is merely an application of the fundamental doctrine that equity protects a creditor only after lien is acquired and after the party has exhausted his adequate remedies at law. *Case of Bauregard* (1879) 101 U. S. 688; *Robert* v. *Hodges* (1863) 16 N. J. Eq. 29; Bump, Fraudulent Conveyances §535. Since the attachment creditor, in the principal case, has fulfilled both requisites the distinction is unsupportable. Due to the uncertainty of an attachment creditor's claim some courts deny him equitable protection. *Meux* v. *Anthony* (1850) 11 Ark. 411. Though much may be said in support of this proposition still, it is suggested, the legislative intention in giving the writ of attachment, i. e., to help creditors against fraudulent conveyances, *People* v. *Cameron* (1845)

7 Ill. 468, and the fact that an undertaking must be given are ample refutation. *Martz* v. *Pfeer* (1883) 80 Ky. 600. The decision in the principal case seems regrettable.

ATTORNEY AND CLIENT—LIEN OF DEFENDANT'S ATTORNEY IN NEW YORK.—The defendant's attorney successfully defended to judgment her claim to certain property and then sought to enforce a lien on the property protected. *Held,* (two judges dissenting) under Code Civ. Proc. §66, giving a lien on the client's "cause of action, claim or counterclaim," a defendant's attorney has no lien. *In re Robinson* (1908) 109 N. Y. Supp. 827.

In New York at common law the attorney's compensation was a matter of statutory regulation, and the lien upon judgment, whether of the plaintiff or defendant's attorney, was confined to the taxable costs. Jones, Liens, Vol. I, 153-157, 184. Code Civ. Proc. (1848) §258, making the attorney's compensation a matter of agreement, did not affect the lien further than to enlarge the extent of its attachment. *Ward* v. *Syme* (1852) 9 How. Prac. 16. Code Civ. Proc. (1876) §66 (A'md 1879) further protected the attorney with a lien from the inception of the "action, claim or counterclaim" but not for an answer mitigating damages, *Pierson* v. *Safford* (1883) 30 Hun 521, or merely establishing a defense without asserting an affirmative cause of action. *Lewis* v. *Burke* (1889) 51 Hun 71; *Longyear* v. *Carter* (1895) 88 Hun 513; *White* v. *Summer* (1897) 16 App. Div. 70. But where the attorney seeks to enforce his lien after securing judgment, §66 is inapplicable, and the lien by virtue of the common law exists upon the judgment recovered irrespective of whether he represent plaintiff or defendant. *In re Bailey* (1884) 31 Hun 608; *In re Lazelle* (N. Y. 1896) 16 Misc. 515; *Albro* v. *Bevins* (1895) 86 Hun 590. Accordingly in the principal case, since it was attempted to enforce the lien after judgment, a different result might well have been reached.

BANKRUPTCY—INSANITY OF BANKRUPT.—After the filing of an involuntary petition the alleged bankrupt was adjudicated insane by a state court and declared to have been so for three years. *Held,* the bankruptcy court had jurisdiction, but the defense of insanity was competent for the jury. *In re Ward* (1908) 161 Fed. 755.

It has always been held that a lunatic has not the mental capacity to commit an act of bankruptcy. *In re Weitzel* (1876) 7 Biss. 289. If the lunatic was sane when the alleged acts of bankruptcy were committed, but adjudged insane before the petition was brought, there was doubt as to the jurisdiction to adjudicate him a bankrupt. *Anonymous* (1807) 13 Ves. Jr. 590 (giving bankruptcy jurisdiction); *Ex parte Cahen* (1879) 10 Ch. Div. 183 (no jurisdiction for voluntary petition); *In re Farnham* (1895) 2 Ch. Div. 799 (doubting jurisdiction); *In re Weitzel, supra; In re Pratt* (1872) 2 Low. 96 (both allowing jurisdiction). But the Bankruptcy Act of 1898 §8, as construed, denies the jurisdiction of a court of bankruptcy of the affairs of a lunatic. *In re Funk* (1900) 4 Am. Bank. Rep. 96; See 2 COLUMBIA LAW REVIEW 556. Once jurisdiction has attached, however, insanity will not bar the proceedings, nor is there now the former difficulty in granting a discharge. *In re Miller* (1904) 13 Am. Bank. Rep. 345; cf. *In re Pratt, supra.* But, after the petition is filed, a judicial declaration of lunacy may prevent an adjudication of the bankruptcy by shifting the burden of proof as to sanity to the creditors, *In re Kehler* (1908) 19 Am. Bank. Rep. 513, and raising an issue of sanity for the jury. The principal case is sound.

CONFLICT OF LAWS—CONCURRENT JURISDICTION—BOUNDARY RIVERS.—A resident of the state of Washington was convicted in Oregon for using a purse net in the Columbia river on the Washington side of the thread which forms the boundary between the two states. The laws of Washington did not make such use illegal. *Held,* where jurisdiction is concurrent, of two conflicting laws, the law of that state which is most restrictive must prevail. *State* v. *Nielson* (Or. 1908) 95 Pac. 720.

To obviate the difficulty of enforcing state laws, Washington and Oregon were given concurrent jurisdiction over the Columbia river. *Sanders* v. *Anchor Line* (1888) 97 Mo. 26; Rorer, Interstate Law 337. This gives each state the power to enforce its own laws over the entire river. *Annie M. Smull* (1872) 2 Sawyer 226; *State* v. *Metcalf* (1896) 65 Mo. App. 681; *Keator Lumber Co.* v. *Boom Corp.* (1888) 72 Wis. 62. Under this definition an act is punishable by either one of two conflicting laws, but this is not fatal, under the principles of international law, *Regina* v. *Anderson* (1868) 11 Cox C. C. 198, which it is submitted, should be applied. The only cases in which the question of conflicting laws has been squarely passed upon, have, however, declared that each state can only enforce such laws as are acquiesced in by the other. *In re Mattson* (1895) 69 Fed. 535; *Ex parte Desjeiro* (1907) 152 Fed. 1004; *President* etc. v. *Bridge Co.* (1860) 13 N. J. Eq. 46. The latter case is to be distinguished on its facts, and the federal cases proceed on doctrines of expediency. Under this view, however, the legislative freedom of each state is curtailed, whereas the object of such jurisdiction was to give the fullest effect to state sovereignty. Note 65 L. R. A. 963. Under neither view is the principal case sound. To obviate all the practical difficulties inherent in either theory, laws common to both should be secured by treaty.

Constitutional Law—Full Faith and Credit—Local Policy.—The plaintiff, a citizen of Mississippi, obtained in Missouri a judgment against the defendant, also a citizen of Mississippi, on a gambling contract entered into in the latter state, and prohibited by its laws. *Held*, the judgment was enforcible in Mississippi. *Fauntleroy* v. *Lum* (1908) 28 Sup. Ct. Rep. 641. See Notes, p. 569.

Constitutional Law—Jury—Waiver of Right to Trial by Twelve Jurors in Criminal Cases.—The defendant's trial for a misdemeanor had progressed at some length when it became necessary to excuse one of the jurors. The defendant and the prosecuting attorney stipulated in writing that the trial should continue with the same force as if the juror had not been discharged. Later a like agreement was made on the discharge of a second juror. *Held*, the verdict of conviction was invalid, as the accused had no power to waive his constitutional right to a trial by twelve jurors. *Dickinson* v. *United States* (1908) 159 Fed. 801. See Notes, p. 577.

Corporations—Promoters—Future Stockholders—Remedies.—The defendant and another organized the plaintiff corporation and, while they held exclusive control, increased its stock from forty shares to one hundred and fifty thousand. For one hundred and thirty thousand of these the corporation bought property in which the defendant was interested. The remaining twenty thousand shares were sold to the public. *Held*, the corporation could not rescind the sale or recover the profits made by the defendant. *Old Dominion Copper etc. Co.* v. *Lewisohn* (1908) 28 Sup. Ct. Rep. 634. See Notes, p. 567.

Criminal Law—Conviction—Effect of Suspended Sentence.—The defendant, having voted while under suspended sentence for burglary, was charged with violation of a statute disfranchising persons "convicted of a felony." *Held*, a verdict of guilty, without sentence, was not a conviction within the meaning of the statute. *People* v. *Fabian* (1908) 40 N. Y. L. Jour., Oct. 6th.

Ordinarily, "conviction," as distinguished from "sentence" or "judgment," signifies the finding of guilt by verdict of a jury. *Com.* v. *Richards* (Mass. 1835) 17 Pick. 295. And in this sense it has frequently been construed when required by justice, or warranted by public understanding. Thus, the plea of *autrefois convict* is a bar to an indictment, although no judgment was rendered. 4 Bl. Comm. 336. And, where a constitution confers the pardoning power upon the executive "after conviction," a par-

don granted after a verdict, but before sentence is valid. *Com.* v. *Lockwood* (1872) 109 Mass. 323. Similarly, a reward, offered for information leading to "conviction," is earned upon return of a verdict of guilty. *Williams* v. *U. S.* (1876) 12 Ct. Cl. 192; *contra, Burgess* v. *Boetefeur* (1844) 49 E. C. L. 481. On the other hand, in cases where "conviction" is made the ground of some disability, incompetency or special penalty, it has been properly held to mean verdict followed by judgment, *Com.* v. *Miller* (1897) 6 Pa. Super. Ct. 35, since no conviction is technically complete until sentence is passed and recorded. *County* v. *Cumberland* (1860) 36 Pa. 349, 353. Accordingly, a judgment has been held essential to corrupt blood by attainder, [2 Inst. 391a]; to disqualify a witness, [*Lee v. Gansel* (1774) Cowp. 1, 3], a voter, [*State* v. *Houston* (1889) 103 N. C. 383; *contra* (*semble*), *U. S.* v. *Watkins* (1881) 6 Fed. Rep. 152], or a legislator, [*Case of Falmouth,* Cush., Mass. Elect. Rep. 203]: to deprive an adulteress of dower, [*Schiffer* v. *Pruden* (1876) 64 N. Y. 47], and to avoid the license of a person convicted of evading liquor laws. [*Com.* v. *Kiley* (1889) 150 Mass. 325; *contra, Quintard* v. *Knoedler* (1885) 53 Conn. 485]. The principal case, coming within the second category of decisions, is clearly sound.

Domestic Relations—Divorce—Conditional Decree.—A wife was granted an absolute divorce, the decree being suspended, however, until the payment of costs. She remarried before the costs were paid. *Held,* her remarriage was valid. *Confer's Estate* (Pa. 1908) Leg. Int., Sept. 4th.

In jurisdictions which hold the entry an essential part of the judgment, this second marriage is illegal as the parties in the original suit were never divorced. *Clark* v. *Cassidy* (1880) 64 Ga. 662; *State* v. *Eaton* (1893) 85 Wis. 587. The better view seems to be that judgment is such upon rendition when the judicial nature of the act terminates, the subsequent entry by the clerk being merely a ministerial act; *Hall v. Tuttle* (N. Y. 1843) 6 Hill 38; *Cook's Estate* (1888) 77 Cal. 220; and the entry is but evidence of the judgment. *Van Orman* v. *Phelps* (N. Y. 1850) 9 Barb. 500; *Newnam's Lessee* v. *Cincinnati* (1850) 18 Oh. 323; *Ansley* v. *Carlos* (1846) 9 Ala. 973. Under this view the second marriage was legal since a court may not suspend the operation of such a decree, for when a judgment is rendered its effect shall not hinge on an ability to pay costs. See *Mickle* v. *State* (Ala. 1896) 21 So. 66. Nor would policy dictate that the validity of a decree secured by the wife should depend on the dereliction of the husband.

Domestic Relations—Married Infants—Alienation.—A secret marriage between infants above the age of consent was followed by malicious alienation of the husband's affection, by his parents. *Held,* the wife, suing by a guardian *ad litem,* may recover. *Cochran* v. *Cochran* (1908) 111 N. Y. Supp. 588.

Although there was at common law some conflict as to a wife's right to sue for alienation, *Duffies* v. *Duffies* (1890) 76 Wis. 374; *Bennett* v. *Bennett* (1889) 116 N. Y. 584, modern statutes have generally given her that right. *Bennett* v. *Bennett, supra; Mehrhoff* v. *Mehrhoff* (1886) 26 Fed. 13. A marriage between infants capable of consenting is valid regardless of parental assent; *Parton* v. *Hervey* (Mass. 1884) 1 Gray 119; *Holtz* v. *Dick* (1884) 42 Oh. St. 23; and although anyone may in good faith harbor a wife who has left her husband, *Hartpence* v. *Rogers* (1898) 143 Mo. 623; *Oakman* v. *Belden* (1900) 94 Me. 280, officious intermeddling with the relation, by a stranger is *prima facie* actionable. *Hartpence* v. *Rogers, supra; Trumbull* v. *Trumbull* (1904) 71 Neb. 186. However, parents may in good faith give advice, and the presumption is that they so act. *Hutcheson* v. *Peck* (N. Y. 1809) 5 Johns. 196; *Payne* v. *Williams* (Tenn. 1875) 4 Baxt. 583; *Trumbull* v. *Trumbull, supra.* But although marriage emancipates infants from parental control, the two relations being inconsistent, *Bennett* v. *Smith* (N. Y. 1856) 21 Barb. 439; *State* v. *Lowell* (1899) 78 Minn. 166, it does not emancipate them at law: they cannot make binding contracts, *Taunton* v. *Plymouth* (1818) 15 Mass. 203; *Sanford* v. *McLean* (N. Y.

1832) 3 Paige 117, and suit must be by guardian *ad litem. O'Hara* v. *McConnell* (1876) 93 U. S. 150; *Heirs* v. *Atl. Coast Line Ry. Co.* (1906) 75 S. C. 311. The alienation in the principal case having been malicious, and suit brought by guardian *ad litem,* the wife was correctly allowed a recovery.

EQUITY—MONOPOLY—RELIEF OF HUMAN SUFFERING.—The defendant contracted to assist the plaintiff, and for ten years not otherwise to practice painless dentistry in Philadelphia where few were expert in its methods. Bill to restrain breach. *Held,* although the common law remedy is inadequate, equity will refuse a decree to prevent plaintiff's securing a monopoly in the scientific means of relieving human suffering. *Thomas* v. *Borden* (Pa. 1908.) Leg. Int., July 31st.

Equity refuses to act where injustice would be done third parties, *Riesz's Appeal* (1873) 73 Pa. 485; *Curran* v. *Water Power Co.* (1874) 116 Mass. 90, or where the public interest would be prejudiced. *Conger* v. *R. R.* (1890) 120 N. Y. 29. However, such contracts as in the principal case, equity does not regard as against public policy since every other person is at liberty to practice in the town, *Davis* v. *Mason* (1793) 5 T. R. 118, and the defendant can be as useful to the public in another place. *Butler* v. *Burleson* (1844) 16 Vt. 176; *Gordon* v. *Mansfield* (1900) 84 Mo. App. 367; *Foss* v. *Roby* (1907) 195 Mass. 292. Nor would the creation of a monopoly seem material, since the injunction would have issued had the plaintiff's process been a trade secret. *Simmons Medical Co.* v. *Simmons* (1897) 81 Fed. 163 (secret process of making a medicine); note 58 C. C. A. 8. Assuming the contract not to be in restraint of trade, no case appears to deny relief because the subject of the contract is the practice of a profession. *McClurg's Appeal* (1868) 58 Pa. St. 51; *Ryan* v. *Hamilton* (1903) 205 Ill. 191. Accordingly, the principal case appears an unwarranted extension of equitable principles.

EQUITY—VENDEE'S LIEN.—The vendor having failed to make a good title, the vendee of real property brought suit to recover the purchase money paid and to have it declared a lien upon the land. *Held,* the plaintiff was entitled to the relief sought. *Elterman* v. *Hyman* (N. Y. 1908) 84 N. E. 937.

The vendee of real property brought suit to rescind the contract on the ground of fraud and to have the purchase money paid declared a lien upon the land. *Held* (three judges dissenting), the plaintiff was entitled to a rescission and the return of the money, but not to a lien, *Davis* v. *Rosenzweig Realty Operating Co.* (N. Y. 1908) 84 N. E. 943. See NOTES, p. 571.

EVIDENCE—PROFERT OF CHILD TO PROVE RESEMBLANCE.—In a suit for seduction, the three months old child of the seduced woman was exhibited to the jury to show its resemblance to the defendant. *Held,* no error. *Anderson* v. *Aupperlee* (Ore. 1908) 95 Pac. 330.

Obviously the resemblance of the child to the putative father is relevant when relationship is at issue, *State* v. *Saidell* (1899) 70 N. H. 174; *Gaunt* v. *State* (1880) 50 N. J. L. 490, but many courts refuse to allow profert of the child on the ground of the uncertainty of the evidence. *State* v. *Neel* (1901) 23 Utah 541; *Clark* v. *Bradstreet* (1888) 80 Me. 454. It would seem that the admissibility of the evidence would depend on whether or not it is of sufficient probative value, and this in turn would depend on the maturity of the child. *Shorten* v. *Judd* (1895) 56 Kan. 43. Some courts have endeavored to lay down an arbitrary rule as to the age under which a child cannot be exhibited, *State* v. *Harvey* (1900) 112 Ia. 416, while others leave the question of sufficient maturity to the discretion of the trial court. *State* v. *Danforth* (1905) 73 N. H. 215. Since the decision of a trial judge as to the existence of facts necessary to the admission of evidence is generally regarded as final, Wigmore, Evid., sec. 16; cf. *Vaughan* v. *State* (1894) 58 Ark. 353, the latter view, followed in the principal case, seems correct.

EVIDENCE—PROVING DANGEROUS TENDENCY BY SHOWING PRIOR ACCIDENT.—The plaintiff was injured in a passage way running through an elevator shaft. Evidence of a prior accident at the same place was sought to be introduced. It seems that no proof of the recency of that accident or of substantial similarity of conditions was offered. *Held,* (two justices dissenting), that although the defendant did not know of the prior accident, testimony thereof was competent. *Cefola* v. *Siegel-Cooper Co.* (1908) 111 N. Y. Supp. 1112. See NOTES, p. 579.

EVIDENCE—TELEPHONE CONVERSATIONS—PROOF OF IDENTITY.—A witness testified to "calling up" a telephone number and asking for the manager. Some one answered whose voice he did not recognize but who spoke intelligently regarding a past transaction. *Held,* the evidence was admissible. *Barrett* v. *Magner* (Minn. 1908) 117 N. W. 249.

Where the admissibility of a telephone conversation depends merely on proof that the witness has been in communication with a particular office, the presumption that the telephone company has done its duty, renders the evidence admissible. *Wolfe* v. *Mo. Pac. Ry.* (1888) 97 Mo. 473; *Reed* v. *R. R.* (1887) 72 Ia. 166; *contra, Cotton Oil Co.* v. *Western Union Tel. Co.* (1906) 126 Ga. 621. Where, however, it is necessary to establish the identity of a particular individual this presumption should be reinforced by proof of identity other than that the person answering assumed to be such individual, *Kimbark* v. *Ill. Car Co.* (1902) 103 Ill. App. 632; *Murphy* v. *Jack* (1894) 142 N. Y. 215; *contra, Guest* v. *R. R.* (1898) 77 Mo. App. 258, and obviously where the witness is himself "called up", since the presumption is useless, other proof of identity is essential. *Vaughn* v. *State* (1900) 130 Ala. 18. In the case of letters, where comparison of hand writing is impossible, proof that their contents show familiarity with the affairs of the alleged writer, is sufficient to admit. *Deep River Bank's Appeal* (1900) 73 Conn. 341; *Singleton* v. *Bremer* (S. C. 1824) Harp. 133. Similarily, knowledge of past transactions should identify a speaker sufficiently to make the evidence admissible, especially since the jury may still find as to the identity on the weight of the evidence. *Wolfe* v. *R. R., supra.* The reasoning of the principal case may therefore be supported.

HIGHWAYS—STREET RAILWAYS.—An electric street railway company laid its tracks upon the highway, the fee of which was in the plaintiff. *Held,* since such a use was an additional burden, the railway must give compensation. *Duncan* v. *Nassau Electric R. Co.* (1908) 111 N. Y. Supp. 210. See NOTES, p. 575.

INSURANCE—SUICIDE—INSANITY.—An insurance policy contained a clause rendering it void if insured should commit suicide, whether sane or insane. *Held,* insured might recover if at the time of the act he did not know its probable result. *Modern Woodmen* v. *Neeley* (Ky. 1908) 111 S. W. 282.

If a suicide understands the physical consequences of his act but not its moral complexion, the suicide clause of a policy is inoperative. *Manhattan Life Ins. Co.* v. *Broughton* (1883) 109 U. S. 121. Such policy, however, must be distinguished from those which contain insanity clauses, as in the principal case. *Bigelow* v. *Ins. Co.* (1876) 93 U. S. 284. All courts agree that the insertion of the insanity clause eliminates an understanding of the moral complexion as a test. Granting that the insured was ignorant of the morality of his act, if he was unconscious of its physical nature and consequences, some courts deem the act as legally an accident, *Pierce* v. *Ins. Co.* (1874) 34 Wis. 389; *Masonic Life Ass'n* v. *Pollard* (1905) 121 Ky. 349, and hold the insurer, *Manhattan Ins. Co.* v. *Beard* (1902) 112 Ky. 455, thus giving but limited effect to the specially inserted insanity clause. But many cases deny recovery if death was caused by any physical act of the deceased. *Clarke* v. *Assurance Soc.* (1902) 55 C. C. A. 200; *Moore* v. *Ins. Co.* (1906) 192 Mass. 468; *Keefer* v. *Modern Woodmen* (1902) 203 Pa. 129. This view would better effectuate the intention of the parties and re-

lieve the courts of the need of distinguishing the degrees of insanity. *Billings* v. *Accident Insurance Co.* (1891) 64 Vt. 78. Both classes of holdings claim to follow *Bigelow* v. *Ins. Co., supra,* but in that case the court expressly limited its decision to its facts. Although the authorities are divided, the decision in the principal case is to be regretted.

INTERSTATE COMMERCE—CRIMINAL INTENT UNDER THE STATUTE.—A statute declared a misdemeanor a carrier's wilful failure to file and publish rates or to adhere strictly thereto, and a shipper's securing transportation by any device, at a concession. A shipper unwittingly paid too little. *Held,* for the defendant, the intent not being material. *The Standard Oil Co. of Ind.* v. *United States* (1908) No. 1409 C. C. A. (7th Circuit).

Although wilfulness has always been an element in the carrier's offense, 24 U. S. St. 379 §10, a shipper was originally liable only if he knowingly employed a device to accomplish a fraud, e. g. false weighing; 25 U. S. St. 857 §10; and although the legislature in its latest enactment has, after debate, 36 Cong. Rec. Pt. 2, p. 2152-4, retained "wilful" as an element of the carrier's offense, it has struck out knowing fraud as a limitation of "any device" employed by the shipper to secure a concession. 32 U. S. St. 847. The apparent intent of Congress was to put the carrier and shipper on an equal footing, and to make knowledge essential. But, the only pertinent decisions of the Supreme Court, *New Haven R. R.* v. *Int. C. C.* (1906) 200 U. S. 361; *Armour Packing Co.* v. *U. S.* (1908) 209 U. S. 56, have construed the act strictly, negativing wilfulness as applied to the carrier, and, in their somewhat conflicting *dicta,* have indicated a similar construction of "device," as opposed to the principal case. Such an interpretation accords with the strict construction usually given where the forbidden acts involve no moral turpitude and are followed by no degrading punishment. *United States* v. *Leathers* (1879) 6 Sawy. 17; *State* v. *Rogers* (1901) 95 Me. 94; *State* v. *Ryan* (1899) 70 N. H. 196.

LABOR UNIONS—LEGALITY OF STRIKE—UNION RULES.—The rule of a federation of labor unions provided that all labor disputes should be settled through the executive council acting for the employees. The employers instituted an "open shop," announcing that they would settle disputes only with the employees involved and not with their organization. The employers sued to enjoin the resulting strike. The employees were not under actual contracts. *Held,* (Knowlton, C. J., dissenting), the rules making the council arbiter and allowing of possible future illegal strikes were illegal. *Reynolds* v. *Davis* (Mass. 1908) 84 N. E. 457.

The decision does not clearly indicate which of the two grounds mentioned is the basis of the reasoning. The principal case is undoubtedly sound if its objection is to arbitration, for this would amount to an unjustifiable interference with the employers' business. But the court more clearly holds the strike illegal because, under the rules the council may inaugurate sympathetic strikes to support an individual grievance. The dissent objects because these rules are made the basis of the decision. Under the Massachusetts labor decisions a labor union may strike to support its rules provided their purpose is not illegal. *Com.* v. *Hunt* (Mass. 1842) 4 Metc. 111, 129; *Carew* v. *Rutherford* (1870) 106 Mass. 1, 10. If the rules do not provide for arbitration but demand only the union's right to decide the course to be pursued by the employee, their purpose involves but little more than the well settled right to organize. It is to be noted that the present strike is not illegal as a sympathetic strike under the test of "trade dispute" in *Picket* v. *Walsh* (1906) 192 Mass. 572. The fact that these rules might lead to strikes in support of individual grievances should not render them unlawful, since all such strikes will not under this test be illegal as sympathetic strikes, e. g., a strike supporting a competent workman who refuses to accept a wage reduction; and the mere apprehension thereof should not warrant the issuing of an injunction. *Aberthaw Constr. Co.* v. *Cameron* (1907) 194 Mass. 208, 215; *Reynolds* v. *Everett* (1894) 144 N. Y. 189.

LITERARY PROPERTY—DRAMATIC COMPOSITION—RIGHTS IN A DANCE.—The plaintiff, owner of an exclusive right to produce an unpublished opera, "The Merry Widow," sought an injunction to restrain the defendant from imitating the waltz in the production. *Held,* the plaintiff had no literary property in the dance, the performers having the rights, if any. *Savage* v. *Hoffman* (1908) 159 Fed. 584.

The common law right of the author in an unpublished manuscript of a dramatic composition to be protected from invasion is well settled. Drone, Copyright, 104, 554; Macgillivray, Law of Copyright, 122. A composition is dramatic which repeats or mimics some action, speech, emotion, passion or character, real or imaginary; *Fuller* v. *Bemis* (1892) 50 Fed. 925, 929; any piece which, on being presented would produce the emotions which are the purpose of regular drama. *Russell* v. *Smith* (1848) 12 Q. B. 217. It has been held that situations, scenic effects, [*Chatterton* v. *Cave* (1875) 33 L. T. N. S. 256], pantomime, [*Lee* v. *Simpson* (1847) 3 C. B. 871], motion and gestures, *Daly* v. *Palmer* (1868) 6 Blatchf. 256, are as much the subject of protection as words. Stage directions for representing narration wholly by action are a dramatic composition. Id., 264. Stage directions for a ballet are a dramatic composition. Drone, Copyright, 588. Assuming that the dance in the principal case is the result of stage directions in the original libretto, since it is an integral part of the dramatic action, it is, as a dramatic composition, a subject for protection, and the plaintiff, owner of the libretto, may assert his right. On the assumption that the dance was not provided for in the original libretto, but was invented by the present performers and proper stage directions then interpolated, it would become the property of the plaintiff by the principle of literary accession. *Keene* v. *Wheatley* (1861) 14 Fed. Cas. 7644. Assuming that such stage directions were never so inserted, it is questionable whether the plaintiff or performers could assert any right, owing to the lack of evidence. *Keene* v. *Wheatley, supra; Abernethy* v. *Hutchinson* (1825) 3 L. J. Ch. 209. If in the latter assumption the question of evidence were waived, it would then appear that the right would belong to the plaintiff from the relation of master and servant. *Keene* v. *Wheatley, supra.* Except possibly on the assumption that there was never any written evidence of the dance, the decision in the principal case appears open to criticism.

MASTER AND SERVANT—TORTS OF THE SERVANT'S HELPER.—In assisting the defendant's driver, a bystander negligently injured the plaintiff. *Held,* defendant was liable since the helper was merely an instrumentality used by the driver in his master's business. *Hollidge* v. *Duncan* (Mass. 1908) 85 N. E. 186.

To hold the defendant it is not necessary that the stranger be regarded as a servant, *James* v. *Muelebach* (1899) 34 Mo. App. 512, nor that the driver in the principal case should have implied authority to engage him, *Booth* v. *Mister* (1835) 7 C. & P. 66, but only that the helper be under the servant's control so as to be in effect a mere instrumentality in the work. *Althorf* v. *Wolfe* (1860) 22 N. Y. 355; *Spencer* v. *State* (1906) 110 App. Div. 585. Shearman and Redfield (Negligence, 4th Ed., 157) attack this doctrine theoretically, arguing that since a principal is not bound by the contracts of a sub-agent employed by the agent without authority, he should not be liable for the sub-agent's tort, and Smith J. in *Jewell* v. *Grand Trunk Ry.* (1874) 55 N. H. 85, insists that to impute the torts of a helper to a master through his servant would violate the rule of proximate cause. But these arguments fail to recognize that the helper is not an independent agent but merely the servant's tool and that his negligence is legally that of the servant, *Simons* v. *Monier* (1859) 29 Barb. 419; *Althorf* v. *Wolfe, supra,* just as a homicide through an innocent agency is the crime of the principal. Wharton, Criminal Law (10th Ed.) §207.

MUNICIPAL CORPORATIONS—CONTRACTS—PAYMENT FROM A SPECIAL FUND.—A city council, authorized by a special election to issue bonds for a lighting plant, engaged the plaintiffs to draw plans. Later the council, without good cause, resubmitted the question to the people and the measure was defeated.

Warrants were issued to the plaintiffs payable out of the general funds, though the city's debt limit had been reached. *Held,* the warrants were valid. *Simons* v. *City of Eugene* (1908) 159 Fed. 307.

When a special fund is authorized for a public improvement a warrant can be drawn on and is payable only from such fund. *Potter* v. *Whatcom* (1901) 25 Wash. 207. But though the contractor has agreed to look to the special fund, it is held that an ordinance creates a duty to raise the fund authorized thereby and neglect to do so will render the city liable *ex delicto. Commercial Bank* v. *Portland* (1893) 24 Or. 188. The principal case is rested on this theory. But it seems that the plaintiffs might have recovered on the contract. Impossibility of performance created by a subsequent act of law operates as a discharge, *Macon etc. R. R.* v. *Gibson* (1890) 85 Ga. 1, but such a law will be unconstitutional unless the right to enact it was expressly reserved. A municipal ordinance is a "law" within this rule. *Iron etc. Ry.* v. *Memphis* (1899) 96 Fed. 113, and an ordinance conditioned upon the approval of the citizens by vote should be similarly regarded. See *Gelpcke* v. *Dubuque* (1863) 1 Wall. 175; *Meyer* v. *Muscatine* (1863) 1 Wall. 385; *Clarke* v. *Rochester* (1864) 28 N. Y. 605 at 635. But there was no reservation of a right to redetermine the question, and it is submitted, therefore, that the acts resulting in the withdrawal of the authority to issue bonds were unconstitutional as to contracts already entered into. Recovery on the contract has even been allowed where the promise to issue bonds was *ultra vires* when made. *Hitchcock* v. *Galveston* (1877) 96 U. S. 341; *State Board* v. *Ry.* (1874) 47 Ind. 407, but the reasoning in these cases, emphasizing receipt of benefits by the defendant, suggests that the real ground is quasi-contractual.

PARTNERSHIP—MARRIED WOMAN'S ACTS—MARRIED WOMAN AS PARTNER.—Action at law brought against a married woman to collect money due from a firm of which she was alleged to have been a member. *Held,* that as the defendant contributed none of her separate estate to the firm's capital, she could not have been a partner. *Morreau* v. *Gas Fixture Co.* (Wash. 1908) 161 Fed. 381.

The right of a married woman to engage in a partnership under modern statutes is much disputed. She has been allowed freely to enter such a contract, *Abbott* v. *Jackson* (1884) 43 Ark. 212, so long as her husband is not interested in the firm, *Plummer* v. *Lord* (Mass. 1862) 5 Allen 460, and has been entirely refused such a right, because the enabling statute forbade a contract by a married woman to answer for the liability of another. *Vannerson* v. *Cheatham* (1894) 41 S. C. 327. Some jurisdictions give her a qualified right on condition that her husband consents to such a use of her separate property. *Penn* v. *Whitehead* (Va. 1867) 17 Gratt. 503. Husband and wife may not become partners under such acts. *Board of Trade* v. *Hayden* (1892) 4 Wash. 263; *contra, Baker* v. *Banking Co.* (1894) 105 Ala. 514. To allow this relation between them violates the purpose of the legislation by again vesting the husband with control, which the statutes deprive him of. By making it possible for the parties to sue one another, the rules of evidence as to their private relations would be disregarded. *Lord* v. *Parker* (Mass. 1861) 3 Allen 127. Reason and authority favor this rule, except in case of a materially altered statute. In New York the law is extremely doubtful in view of the conflicting decisions. Cf. *Zimmerman* v. *Erhard* (1879) 8 Daly 311, affirmed 83 N. Y. 74; *Hendricks* v. *Isaacs* (1889) 117 N. Y. 411; *Suau* v. *Caffe* (1890) 122 N. Y. 208. As the wife in the principal case had not invested separate property, and the husband was the one actually engaged in business, in law he should be regarded as the partner. *Swasey* v. *Antram* (1873) 24 Oh. St. 87.

PERSONAL PROPERTY—WILLS—RULE IN SHELLEY'S CASE.—Personalty was bequeathed in trust for the support of A for life, and after A's death all to be held discharged of the aforesaid trust for the use of the heirs and assigns of A forever. *Held,* the Rule in Shelley's Case did not apply, and therefore the corpus passed to the heirs and assigns. *Jones* v. *Reeves* (Del. 1908) 69 Atl. 785. See NOTES, p. 573.

PLEADING AND PRACTICE—APPEAL—JOINT AND SEVERAL JUDGMENTS.—An executor sued for the construction of a will joining six next of kin as parties defendant. Four appealed from an adverse judgment which was reversed for all the next of kin. On motion to amend the remittitur. *Held*, (three judges dissenting), the judgment was several and did not inure to the benefit of the next of kin not appealing. *St. Johns* v. *The Andrews Institute* (N. Y. 1908) 85 N. E. 143.

The rights of parties not joining in an appeal depend, at common law, upon the nature of the judgment. A joint judgment, reversed as to one co-defendant, must be reversed as to all. *Altman* v. *Hofeller* (1897) 152 N. Y. 498. See 4 COLUMBIA LAW REVIEW 141. If a judgment, though joint in form, be several in fact and law, *Hanrick* v. *Patrick* (1886) 119 U. S. 156 at 163, a party having such several interest may appeal without joining co-parties, or the appellate tribunal may reverse or modify the judgment without affecting the parties not before it. *Geraud v. Stagg* (1855) 10 How. Pr. 369. There is no authority for the dissenting judge's proposition that the next of kin are united in interest as a "class." They are tenants in common, and their rights of action are separate and independent. *Hyde* v. *Stone* (1828) 9 Cow. 230; *Fairchild* v. *Edson* (1897) 154 N. Y. 199. A judgment for construction of a will is conclusive as to all parties joined and those in privity with them. *Lowe* v. *Holder* (1899) 106 Ga. 879. But there is no such privity between next of kin that one will be bound or benefited by a judgment rendered in an action conducted by another in which he was not made a party or represented. *Purdy* v. *Doyle* (1829) 1 Paige 558. The two next of kin were not represented on appeal by the executor; he could not appeal, not being a "party aggrieved." *Bryant* v. *Thompson* (1891) 128 N. Y. 426. Had the judgment below been in favor of the next of kin that judgment could have been reversed only as to such as were made parties to the appeal. *McCammon* v. *Worrall* (1844) 11 Paige Ch. 99. Parties who fail to appeal are deemed to acquiesce in the judgment below. *Todd* v. *Daniel* (1842) 16 Pet. 521. The principal case is sound. Similar inconsistent judgments are of record. See *Anderson* v. *Anderson* (1889) 112 N. Y. 104.

PLEADING AND PRACTICE—COUNTERCLAIM—EXISTING CAUSES OF ACTION.—To an action on a note defendant counterclaimed breach of plaintiff's contract not to sue for a fixed time. *Held*, a valid counterclaim, despite a statute allowing only the counterclaim of causes of action existing when the (principal) action was begun. *Hall* v. *Parsons* (Minn. 1908) 117 N. W. 280.

A contract never to sue operates as a release and may be pleaded in bar to avoid circuity of action, *Millett* v. *Hayford* (1853) 1 Wis. 401, but an agreement not to sue for a fixed time will not be a bar; *Gibson* v. *Gibson* (1818) 15 Mass. 106; *Guard* v. *Whiteside* (1851) 13 Ill. 7; *Chandler* v. *Herrick* (N. Y. 1821) 19 John. 129; but see *Clopper's Adm'rs* v. *Union Bank of Maryland* (Md. 1826) 7 Harris and J. 92, *contra;* since the rule that a right of action once suspended by act of the party is wholly lost, prevents the temporary suspension of the cause. *Winans* v. *Houston* (1831) 6 Wend. 471; *Guard* v. *Whiteside, supra.* Such agreement should be admitted as a counterclaim, for the statutes allowing counterclaims aim to avoid circuity of action, and the provisions limiting them to causes existing when the plaintiff's suit began were merely directed against surprising the plaintiff by new or purchased claims. *Shannon* v. *Wilson* (1862) 19 Ind. 112; *Clarke* v. *Magruder* (Md. 1807) 2 Harris and J. 67. The counterclaim in the principal case is within the letter of the statute for since by bringing suit plaintiff broke his contract, defendant's claim accrued concurrently and therefore existed when (though not before) the action was begun. But see *contra* the parallel case of *Newkirk* v. *Nield* (1862) 19 Ind. 194. Though some authorities hold that "damages caused by the institution of a suit cannot be counterclaimed therein," 25 Am. and Eng. Encyc. 575 (2nd Ed.); *Arkansas City Bank* v. *Hasil* (1897) 57 Hun 754; *Kansas,*

etc. Co. v. *Hutton* (1892) 48 Kan. 166; but see *Reed* v. *Chubb Bros.* (1859) 9 Ia. 178, *contra*, the policy of the statute and the rule of liberal construction of code sections seem to support the principal case.

PUBLIC SERVICE COMPANIES—DISCRIMINATION IN FACILITIES—PRIVATE CARS.—A carrier distributed its cars *pro rata*, making no deduction for cars upon its lines, owned by individual shippers. *Held*, such a method was an unlawful discrimination in favor of private car owners. *U. S. ex rel. Pitcairn Coal Co.* v. *B. & O. R.R. Co.* (1908) 4th Circuit, No. 773.

A carrier must furnish facilities adequate to meet ordinary needs, *Pittsburg etc. R.R. Co.* v. *Morton* (1878) 61 Md. 539, but if unable, must make a *pro rata* distribution of such as it has. *Riddle Dean & Co.* v. *N. Y. etc. R.R. Co.* (1888) 1 I. C. C. R. 504. When a shipper adds private cars to the railway's equipment, he is held to have submitted them to any reasonable rules which the carrier must enact to fulfil his obligation. *Logan Coal Co.* v. *Penn. R.R. Co.* (1907) 154 Fed. 497. And a shipper cannot receive benefits by supplying himself with those facilities which the carrier should itself furnish. *State ex rel.* v. *C. N. O. etc. Ry. Co.* (1890) 47 Oh. St. 130. The principal case is sound since by failing to deduct for cars owned by an individual shipper the carrier would be giving him a benefit at the expense of others. *Rice* v. *R.R.* (1888) 1 I. C. C. R. 503, 547-9; *R.R. Comm.* v. *Hocking Valley Ry. Co.* (1907) 12 I. C. C. R. 398. That the private cars be furnished other shippers, if the carrier's own facilities be inadequate, is a logical extension of the rule in the principal case, though opposed to a dictum in *R.R. Comm.* v. *Hocking, supra.* Such an extension would accord more with a sound public policy and is the only rule consistent with Section 1 of the Act to Regulate Commerce providing that "cars shall be furnished irrespective of ownership."

QUASI CONTRACTS—DEBTS OF A THIRD PARTY—PAYMENT UNDER COMPULSION.—A tax was assessed against the defendant's interest as mortgagee in certain land. Later, the mortgage having been paid off, the plaintiff bought the land and paid the tax in order to remove the lien. *Held*, plaintiff could not recover such payment from the defendant in the absence of contract. *William Ede Co.* v. *Heywood* (Cal. 1908) 96 Pac. 81.

Where money is paid to avoid illegal judicial process directed against personal property, the payment is, in the main, regarded as involuntary, since the property is generally liable to immediate seizure. *Preston* v. *City of Boston* (Mass. 1831) 12 Pick. 7. In the case of real property the courts have been more unwilling to grant relief, since the plaintiff could generally have protected his property by attacking the illegal process, 7 COLUMBIA LAW REVIEW 601; *Fleetwood* v. *City of New York* (N. Y. 1849) 2 Sandf. 475. To render all such payments involuntary the danger to the property must be so immediate that payment is the only adequate protection. *Brumagin* v. *Tillinghast* (1861) 18 Cal. 265; *Lamborn* v. *Co. Commissioners* (1877) 97 U. S. 181. Where, however, the plaintiff pays to a third person an obligation owed by the defendant, in order to protect his property from a legal claim against it, there need be no immediate danger or actual duress to entitle him to recover, since the very existence of such valid claim is sufficient compulsion to render the payment involuntary, *Brown* v. *Hodgson* (1811) 4 Taunt. 189; *Van Santen* v. *Standard Oil Co.* (1880) 81 N. Y. 171, and the law compels the defendant, for whose benefit the money was involuntarily paid, to refund it, irrespective of any express agreement between the parties. *Treat* v. *Craig* (1901) 135 Cal. 91; *Dana* v. *Colby* (1884) 63 N. H. 169. The principal case cannot be supported.

REAL PROPERTY—LATERAL SUPPORT—HIGHWAYS.—A municipal corporation asked an injunction against one who was endangering the highway by excavating deeply in abutting land. *Held*, injunction would issue since regardless of who owns the fee of the highway, the abutter owes it lateral support even though the pressure be increased by improvements. *Village of Haverstraw v. Eckerson* (N. Y. 1908) 84 N. E. 578.

Adjoining owners owe support to land in its natural state but not to superincumbent weight. *Farrand v. Marshall* (N. Y. 1853) 19 Barb. 380. Between private owners the rule has been applied strictly; *Pullan v. Stallman* (1903) 70 N. J. L. 10; and where the public owns the fee of the highway, it would seem that the same rule would apply but for considerations of public policy which appeared to justify an extension of the rule. Cf. *Bond* v. *Smith* (N. Y. 1887) 44 Hun 219. But where the fee is in the abutter, the principal case might be supported on the ground that a dedication to highway purposes includes the right to use all appropriate appliances for the enjoyment of that right; 8 COLUMBIA LAW REVIEW 575, and if one grants such right of passage he may not use his land so as to inconvenience or obstruct the enjoyment of the right granted. *Underwood v. Carney* (Mass. 1848) 1 Cush. 285; *Washburn, Easements* (4th Ed.) 291. No well considered authority has been found directly bearing on the principal case.

TRUSTS—DEVISE IN EVASION OF STATUTE—SECRET TRUSTS.—Under a statute avoiding devises to charity made within thirty days of the testator's death, land was devised to a catholic church, provided that, on the testator's death within thirty days, it should go to "Most Rev. P. J. Ryan, Archbishop of Philadelphia, absolutely." The latter knew nothing of the devise. *Held*, he was entitled absolutely. *Flood* v. *Ryan* (Pa. 1908) 69 Atl. 908.

The case, in its facts, goes beyond *Schultz's Appeal* (1875) 80 Pa. 396, and *Hodnett's Estate* (1893) 154 Pa. 485, the authorities relied on to support it. But the result is sound though the opinions reflect a confusion of equitable principles with considerations of public policy. Courts of Equity have enforced a resulting trust where the devisee, though innocent of any fraud, has silently acquiesced in the devise as on trust. *O'Hara* v. *Dudley* (1884) 95 N. Y. 403. But a knowledge of the testator's intent, communicated in his lifetime, is indispensable. *Wallgrave* v. *Tebbs* (1855) 2 Kay & J. 313. Both of these principles were invoked in *Fairchild* v. *Edson* (1897) 154 N. Y. 199 at 220, where one of three legatees taking under the same clause was declared a trustee. In the principal case the testator's purpose to evade the statute was conceded and the devisee intended to comply therewith. On similar facts in *Gore* v. *Clarke* (1892) 37 S. C. 537, a gift was declared void as a fraud upon the law. Public policy in certain cases may demand a broad construction of statutes, as in conveyances in fraud of transfer tax laws. *Matter of Cornell* (1901) 66 App. Div. 162, 169. But where an abridgment of the *jus disponendi* and the defeasance of an absolute devise are involved, the courts should await legislative action rather than extend the application of a statute under the guise of equitable principles.

BOOK REVIEWS.

ROBERT W. SKINNER, JR., *Editor-in-Charge.*

THE LAW OF THE FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES. By FREDERIC JESUP STIMSON, Boston: The Boston Book Co. 1908. pp. xxii, 386.

Professor Stimson has done a valuable piece of work in this latest volume in the field of legal and constitutional investigation. Its importance perhaps does not lie largely in what might be called the original, historical or critical portion. These are not extensive and perhaps it is not too severe to say that parts of the historical treatment do not carry conviction from the standpoint of accuracy and certainty. The work does, however, possess certain qualities highly desirable to the student which it is the purpose of this review briefly to point out.

In the first place the author in this work follows out his idea, appearing in his book "American Constitution," viz., that Constitutional Law is a "live science." It has become much the mode in different fields of social science to emphasize clearly two distinct views of social life, the "static" and the "dynamic." For example, this has been done in the science of Economics by eminent scholars, like Professor J. R. Clark, in a most helpful and enlightening fashion. Fundamental in such a treatment is an analysis of those basic principles underlying social life as preparatory to the further discussion of the change wrought in this static state through those mighty dynamic forces which with the passing years reveal themselves. Gradually through the influences of such students as Professor Stimson we are coming more and more to place proper emphasis upon these great changes through which legal analysis must make its way. A most fruitful task it has certainly proved. To the study of the general principles in the abstract such eminent students of the Constitution as Cooley, Dicey and others have brought the services of their extraordinary powers. One finds, however, in the works of Mr. Stimson the appreciation of the social side of life and the transforming influences of economic development upon the letter and the spirit of the law. It is, no doubt, a fruitage of this enlarged view of the mission and sphere of law that is seen in the decisions of the court, see *Mueler* v. *Oregon* (1908), 28 Sup. Ct. Rep. 324, where the legal, technical factors have yielded, to an extent at least, to that growing social necessity thrust upon us by economic change. Such studies help to make real the well-known proposition that constitutional law is a "living science." To the realization of this desirable end Professor Stimson's work lends valuable aid. In his chapters on "The Right to Liberty," "The Right to Labor and Trade," "Chancery and the Injunction Order," this method and theory have been followed with results most gratifying.

A second very commendable feature of his works is the great pains displayed in analyzing the constitutions, state and national, and the vast amount of data there furnished as to the actual statement of these instruments touching the general sub-divisions of constitutional law as the Bill of Rights, political provisions, powers to legislate, etc. This work is of real value to the more general student at least and the method is certainly

valuable to all. Equally important is the author's judicial position taken on such live questions as Injunction—an attitude which tends to call upon his readers, radical though they may be, for the sober second thought on all these great questions, which Dr. Von Holst once called the saving feature in a democracy.

The book under review is divided into two main parts, the first of which deals with the historical character of our institutions, the second setting forth in a succinct, if not always in the most readable, form the provisions of the leading constitutional sources on the more important questions.

If adverse criticism were to be passed it might lie in this, that the historical portion dealing with extensive areas of English constitutional history appears rather sketchy, and does not perhaps make clear enough that many of the steps in this development are controverted points among the greatest scholars of English legal and political history. Very few of these questions can be really considered as settled. The fact that it is a broad historical essay tends, of course, to lessen the force of this objection. The work is such as should appeal to legal students on both sides of the water and should prove of value to students of the law in either its broader or more technical aspect.

THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION. By FREDERICK H. COOKE. New York: Baker, Voorhis & Co. 1908. pp. xcii, 302.

The profession is indeed to be congratulated upon the timely appearance of this well-considered and carefully argued work, dealing with a subject which has in the last two decades given rise to perhaps the most important and conspicuous legal controversies within the domain of Constitutional Law and Political Economy. At a time when the outlawry of the individual by administrative proclamation and without due process of law, and when "the disparagement of the courts" in the endeavor to undermine their position as the highest interpreters and defenders of the constitutional rights and immunities of the individual, would seem to be looked upon by the public as an executive function and as an evidence of large statesmanship, it is well that the legal profession turn anew to the study of the Constitution and learn from that great bulwark of human liberty the "lessons of the fathers."

The author has well performed the difficult task undertaken,—to reconcile the decisions which have grown up "in a sporadic and haphazard fashion" and, amid the "codeless myriad of precedent," to discover "the underlying unifying principles" which were largely inadequately comprehended, or entirely lost sight of by the courts. His definition of the word "commerce," as used in the constitutional provision in question, is to be commended in the present state of the law, but will doubtless have to be abandoned in the progressive development of the subject, which it is apparent is taking place, and which will be accelerated in the years to come, as the importance of the Commerce Clause of the National Constitution becomes even more manifest.

The author's theses are as follows: Commerce as used in the Commerce Clause of the Constitution is "transportation, including that of person, tangible property and of intelligence." The regulation of interstate and foreign commerce by the Federal Government is not a concurrent, but an exclu-

sive power of the Federal Government, and only in exceptional cases can such commerce be regulated under the authority of the State. Such exceptional cases include (1) the establishment and maintenance of means of transportation; (2) the control of persons and property; (3) the regulation of the conduct and liability of those engaged in such transportation when such regulation affects (1) the public generally; (2) those enjoying the benefit of transportation wholly within a State, but not (3) when such regulation affects those enjoying the benefit of the interstate or foreign transportation.

The author has had great difficulty in attempting to reconcile the decisions with the propositions laid down by him, and, in fact, is obliged to admit that it is impossible to reconcile even some of the leading cases. He has, however, with conspicuous ability, argued his points, set forth the unifying principles underlying most of the cases, and with clearness surveyed the dividing line between the power of Congress and that of the States within the domain of the commerce clause, as already drawn by the decisions. His work will not only be of value to the practising attorney, but to the courts themselves, in further interpreting the Commerce Clause.

It is unfortunate that the work on so important a subject—one which to-day engrosses so much of the public mind—should not have been written in a more readable style, and that much that is in the foot-notes, which comprise more than one-half of the printed matter of the book, should not have been incorporated in the text. And it is regrettable that this otherwise commendable work should have been written in the "dry language of the law" and be lacking to so great a degree in that terseness and limpidity of expression and beauty of language which make many of the early law reports attractive reading, and which characterize the work of the great jurist and cultured scholar on the bench.

The author's work is entitled to high praise for its evidences of most patient research and exhaustive study of the numerous authorities, their careful and logical arrangement, the ability with which he has deduced therefrom the underlying principles and has selected for fearless attack such of the authorities as are not based upon sound reasoning.

HANDBOOK OF THE LAW OF EVIDENCE. By JOHN JAY MCKELVEY. Second Edition: St. Paul, Minn.: West Publishing Co. 1907. pp. xvii, 540.

This book is probably the most popular and extensively used of all the books in the Hornbook series. It should prove even more serviceable in its new and enlarged form. The references have been brought down to date. Thus in connection with the subject of Presumption, reference is made to the much discussed charge of Mr. Justice Fitzgerald in *People* v. *Thaw*, and the author claims, at page 102 in an interesting foot-note, that the learned Justice has misconceived the principle regarding the burden of proof where the question of sanity is at issue. While the citations are not numerous, an examination by the writer reveals a uniform correctness and pertinancy to the point considered in the text—something somewhat unusual in these days of ill-digested and misapplied authorities. Chapters particularly useful are those of judicial notice and admissions, the latter of which has been rewritten and much enlarged since the first edition.

As a rule, the author seems to have accurately and concisely stated the

law, with no attempts at theorizing and but few at criticism, either of which would have been out of place in a work of this kind. The influence of Professor Thayer, under whom we believe the author studied, is manifest throughout the work. Regardless, however, of the question of originality, the work is of value for ready reference or for use in connection with the local digest.

The author is particularly to be commended for having followed the practice, originated, we believe, by Professor Wigmore in his work on Evidence, of concisely stating the gist of each case cited in the foot-notes. Since Professor Wigmore adopted this scheme with regard to the cases cited in the foot-notes of his work on Evidence, there is no excuse for subsequent legal authors accumulating a mass of unexplained citations in the foot-notes to the text of their works.

TRIAL EVIDENCE. By RICHARD LEA KENNEDY. St. Paul, Minn.: Keefe-Davidson Publishing Co. 1906. pp. vii, 49.

The author has attempted to gather in compendious form the more important rules of evidence for rapid reference at a trial. Such a work cannot, of course, represent a contribution to legal theory, or even serve any valuable purpose in disseminating legal principle. It is, perhaps, inevitable that a book with this object should state what is deemed to be the law in a colorless and incoherent fashion. Another fault, perhaps also inherent, is incompleteness. For example, the treatment of the waiver of privilege is so fragmentary as to be practically useless. But the greatest defect of this little work lies in this: That it is written to suit all jurisdictions, and therefore suits none on any of the disputed points in the law of evidence. It is not very solid comfort that is derived by the attorney in the heat of a trial to find the statement that "jurisdictions are not in accord on this point," without even a hint as to which way the decisions run in his particular State. A volume, which makes no pretense of being useful in any other way, except that of an emergency reference, should really profess to be applicable to but a single jurisdiction precisely like other works on practice. We cannot see that this book fills any want not already satisfied by an edition of Stephen's Digest, discreetly annotated with respect to a particular jurisdiction; and it is lamentable but true that, in many instances, it does not fill these wants either so completely or so well.

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SOME NEW ASPECTS OF PARTNERSHIP BANKRUPTCY UNDER THE ACT OF 1898.

In his posthumous work on "The Origin, Growth and Function of Law," Mr. James C. Carter ventured into the dangerous realm of definition by asserting that legislation is "law consciously enacted by men," [1] —but with characteristic caution added that some "qualification is needed."

If by conscious enactment is meant any foreknowledge by statute-lawmakers of the logically necessary results of the words they use, legal history is filled with examples that require serious qualification of the definition suggested; and perhaps there is no better instance of its incompleteness than the ten-year history of subdivisions *a* and *f* of the fifth section of the present Bankruptcy Act.

It is common knowledge that out of the blunt words of subdivision *a*,—that "a partnership * * * may be adjudged a bankrupt" has arisen the doctrine of partnership entity;—while out of both subdivision *a* and the opening words of subdivision *f* that

> "the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts,"—

have grown conflicting decisions illustrative not only of the legislative lack of consciousness, but of that inherent conservatism of the Bar which always delays (and sometimes defeats) the full effect of any new statutory declaration.

It is often interesting to note the origin of phrases which are the small change of literature, and "partnership entity" is now a legal commonplace. For it the profession seems to be indebted to

[1] P. 182.

Judge Thomas of the Eastern District of New York, and Mr. Lowell, whose work on Bankruptcy was published in 1899.

Within a few months after the present statute became operative Judge Thomas decided *Chemical Bank* v. *Meyer*,[2] and in his opinion[3] said that the language of the Act seemed to show that Congress had "endowed all partnerships with something of the nature of a separate and distinct *entity*." A few months later when Mr. Lowell published his book this case was the only reported decision on subdivision *a*, and he prophetically declared that although the fifth section of the new Act was "very similar to the corresponding section of the Act of 1867," yet there was "one important addition which seems to recognize the commercial view of the partnership as a separate *entity*. This will modify the old law in an important respect."

Despite the prompt recognition by the Bar of a legal novelty in Section five I have found no evidence that the framers of the Act attached any importance to the form of words they used.

It seems plain now that the difference between the brief declaration that a partnership may be adjudged a bankrupt and the language of the 36th Section of the Act of 1867,—wherein all the provisions regarding partnership bankruptcy are prefaced by the words "where two or more persons who are partners in trade shall be adjudged bankrupt,"—should be apparent upon cursory reading. Yet Section five in its present shape was reported to the House of Representatives by the appropriate committee on April 13, 1896, and is said to have been modeled upon the Bill so long urged by Mr. Torrey, who is justly looked upon as the father of our present system. Mr. Lowell declares that the idea of rendering a partnership as such liable to the operation of the statute had been conceived by his father (the late Judge John Lowell of Massachusetts), who as early as 1884 had drafted a scheme of bankruptcy. But it does not appear that Mr. Torrey availed himself of Judge Lowell's efforts or even knew of them. Section five was never discussed in any reported transaction of either House or Senate and although Mr. Torrey spoke before numerous business associations in favor of the Bill and submitted to cross-examination regarding many of its details, a reading of all the pamphlets on the subject I have been able to discover does not reveal that prior to the passage of the Act anyone had observed or

[2](1899) 92 Fed. 896.
[3]At p. 899.

objected that the proposed statute made out of an association of partners an entirely new, separate and distinct "person," *i. e.*, the partnership entity.

The *Meyer* Case[4] therefore opened the discussion of a wholly novel question, and the way it is treated in the opinions of both Judge Thomas and the Appellate Court[5] shows, I think, an unusual readiness on the part of those courts to accept and enforce a new doctrine necessarily flowing from words authoritatively laid before the profession without discussion and without introduction. Yet Judge Thomas voiced misgivings characteristic of an experienced lawyer obliged to set up new standards and work out new results in a portion of the law already explored and marked by familiar beacons.

Thus he said[6] that "the plain language of the statute wars against its acknowledged object, to discharge debtors, as well as against the essential nature of a partnership," for partnership is "but the relation which arises from the agreement of certain persons to combine their property, labor, and skill in business for the purposes of profit." Accordingly, the partnership cannot "commit an act of bankruptcy unless one or more individuals composing the partnership" commit an act which is "tantamount to the partnership itself" doing so. And since this is the necessary course of business it did not seem to him "practical to give a partnership such personality, nor to administer its affairs without a contemporaneous administration of the estate of at least one of the partners;"—because it is "difficult to conceive of a partnership, although it be regarded as a person, being adjudged bankrupt" unless one or more of the partners be at the same time so adjudged.

As Judge Thomas in this case had before him the familiar figure of one partner he felt able to proceed, even though this natural person was accompanied by the new and somewhat terrifying presence of a partnership entity created by statute; and the practice of joining the partnership with some of the partners has received full acceptance, as may be seen in the opinion of the Court of Appeals for the Seventh Circuit,[7] and the cases there enumerated.

Yet despite the prompt partial acceptance of the new doctrine by most Courts, the *Meyer* decision itself contained in the doubt

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[4] *Supra.*
[5] *In re* Meyer (1899) 98 Fed. 976.
[6] At p. 899.
[7] *In re* Stein & Co. (1904) 127 Fed. 547.

expressed as to the possibility of adjudicating a partnership without contemporaneously adjudicating the partner,—something capable of emasculating subdivision *a;* and the reports show that most Judges were not ready to wholly divorce the partnership personality from the person of the partner.

If all the partners of a firm are bankrupt the firm itself is almost necessarily bankrupt,—but if the firm be a person in the eye of the law that artificial person must have the faculty of becoming bankrupt without any reference to the individual property, poverty or wealth of the natural persons composing it. This idea was too revolutionary to receive immediate acceptance, and in *In re Blair*[8] the Southern District of New York, when the statute was scarcely a year old, held that:

"No doubt a firm is sometimes said to be insolvent when only a deficiency of joint assets is meant. But as each partner is liable *in solido* for the debts of the company, so that they are debts of each individual member as much and as truly as they are debts of the firm, a partnership cannot with strictness be said to be insolvent while any one of the partners is able to pay all the firm's liabilities."[9]

Bankruptcy without insolvency is possible, but extremely rare; and if the test of partnership insolvency were to remain unchanged subdivision *a* would in practice be nearly lifeless. It would logically follow that creditors might file a petition against a firm and the known partners and yet be defeated by discovering a secret solvent partner who manifested no desire to administer upon the firm's assets or discharge its liabilities;—and this attempt was actually made in *In re Harris.*[10]

The *Blair* Case seems to me convincing evidence of professional conservatism. It was plain enough that Congress had made a partnership as such capable of adjudication. But Congress had not by the letter of the statute changed the test of partnership insolvency which courts had long before created for themselves, and therefore Judge Brown in the *Blair* matter adhered to the old test of insolvency regardless of its effect on the practical administration of law under the new statute. His decision was often followed, and finally approved in a Court of Appeals (Sixth Circuit) in *Vaccaro* v. *Security Bank.*[11]

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[8] (1900) 99 Fed. 76.
[9] At p. 79.
[10] (1899) 108 Fed. 517.
[11] (1900) 103 Fed. 436.

The language of this last decision has unfortunately been carried into the text-books, and it is only recently that the Appellate Court for the Eighth Circuit, in *In re Bertenshaw*,[12] has fairly met the issue and plainly declared that because a partnership is a distinct entity, separate from the individuals who compose it, its property and its debts are separate and distinct from the property of its individual members and from their individual debts,—and that the partnership is insolvent under the present Act when the aggregate of the joint property is not sufficient to pay the joint debts. This decision has lately been followed even in the Second Circuit.[13]

It is not yet certain which view will meet with full acceptance, but to me it is clear that only by accepting the *Bertenshaw* decision can the Courts live up to the language of the Act. A partnership being now a person for bankruptcy purposes,—if some of the incidents of adjudication are inappropriate to such artificial personality the same condition has long existed as to corporations; it is also true that one object of bankruptcy proceedings is to relieve debtors, but it is quite as much an object to secure equitable distribution of assets, and the latter procedure is first in order of time. Partners who wish release from liability have an open path before them, but creditors who wish dividends and desire to prevent preferences must act quickly and should not be hampered by nice questions of possible solvency of possible partners. The Legislature builded better than it knew, and the duty of the Courts is to take the statutory words at their full value and not prevent relief by adherence to old definitions that do not square with the result promised by the Act.

The difficulties foreseen in the *Meyer* Case are imaginary rather that real;—I have known of no voluntary petition by a firm entity; and of but one involuntary petition against that entity alone.[14] It is not impossible to conceive of an entity discharge; the fact that it would have no practical value is no reason for keeping the firm out of Court, while personal discharges to all who are adjudicated in partnership proceedings are now of daily occurrence, and any partner not joined or not adjudicated is neither helped nor harmed by the petition[15]—nor should he be,—while any solvent partner who will undertake the liquidation of the firm has his rights secured by the Act itself.

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[12](1907) 157 Fed. 363.
[13]*In re* Solomon & Carvel (1908) 163 Fed. 140.
[14]*In re* Pincus (1906) 147 Fed. 621.
[15]*In re* Pincus, *supra*; *In re* Coe (1907) 157 Fed. 308.

The new language sympathetically interpreted secures to the creditor a prompt seizure of firm assets,—without regard to dead, insane, absent, dormant or secret partners, who as experience shows are commonly used by the active members to harass and obstruct those holding just demands against the firm.

Subdivision *f* presents an interesting and even amusing instance of the effect of taking any principle of law out of the fluid and changing current of judicial opinion and making a statute therefrom. A lawyer reading the subdivision in embryo would doubtless have regarded it as merely declaratory of an existing general rule; but the rule is hardly older than the vexatious and ill-defined exception that where no firm assets exist individual and partnership creditors share *pari passu* in individual property.

Does an act declaratory of a rule of law declare also by implication the established exceptions to that rule? The Second Circuit has found that to engraft the established exception on the statutory declaration would be judicial legislation,—something as abhorrent in theory as frequent in practice.[16] The Third Circuit has accepted the rule and the exception,[17] and the Judges of the Fourth Circuit have looked over both decisions and taken sides with their brothers of the Second without adding much to the discussion of principles.[18]

Judge Francis Lowell's interesting and exhaustive history of the exception[19] seems to me effectually to dispose of any predisposition to maintain it; but the serious legal question remains, —How shall this or any similar statute be interpreted? I venture to think that until codification becomes the rule, and codes of municipal law are to be regarded as merely indicative of general principles, the application of which to special cases rests largely in judicial discretion, a statutory declaration of a rule of conduct should be taken as exclusive and complete, not to be widened or narrowed but by the Legislature, and that therefore the *Jancs* decision expresses the only safe rule in modern bankruptcy.

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[16] *In re* Janes (1904) 133 Fed. 912.
[17] Conrader *v.* Cohen (1903) 121 Fed. 801.
[18] Euclid National Bank *v.* Union Trust Co. (1906) 17 Am. B. R. 834.
[19] *In re* Wilcox (1899) 94 Fed. 84.

MECHANICAL JURISPRUDENCE.[1]

"There is no way," says Sir Frederick Pollock, "by which modern law can escape from the scientific and artificial character imposed on it by the demand of modern societies for full, equal, and exact justice."[2] An Australian judge has stated the same proposition in these words: "The public is more interested than it knows in maintaining the highest scientific standard in the administration of justice."[3] Every lawyer feels this, and every thoughtful student of institutions must admit it. But what do we mean by the word "scientific" in this connection? What is scientific law? What constitutes science in the administration of justice? Sir Frederick Pollock gives us the clew when he defines the reasons that compel law to take on this scientific character as three: the demand for full justice, that is for solutions that go to the root of controversies; the demand for equal justice, that is a like adjustment of like relations under like conditions; and the demand for exact justice, that is for a justice whose operations, within reasonable limits, may be predicted in advance of action. In other words, the marks of a scientific law are, conformity to reason, uniformity, and certainty. Scientific law is a reasoned body of principles for the administration of justice, and its antithesis is a system of enforcing magisterial caprice, however honest, and however much disguised under the name of justice or equity or natural law. But this scientific character of law is a means,—a means toward the end of law, which is the administration of justice. Law is forced to take on this character in order to accomplish its end fully, equally, and exactly; and in so far as it fails to perform its function fully, equally and exactly, it fails in the end for which it exists. Law is scientific in order to eliminate so far as may be the personal equation in judicial administration, to preclude corruption and to limit the dangerous possibilities of magisterial ignorance. Law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.

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[1]The substance of this paper was presented before the Bar Association of North Dakota, at its annual meeting, at Valley City, N. D., Sept. 25, 1908.

[2]A First Book of Jurisprudence, 56.

[3]Richmond, J., quoted in Clark, Australian Constitutional Law, 348.

Two dangers have to be guarded against in a scientific legal system, one of them in the direction of the effect of its scientific and artificial character upon the public, the other in the direction of its effect upon the courts and the legal profession. With respect to the first danger, it is well to remember that law must not become too scientific for the people to appreciate its workings.[4] Law has the practical function of adjusting every-day relations so as to meet current ideas of fair play. It must not become so completely artificial that the public is led to regard it as wholly arbitrary. No institution can stand upon such a basis to-day. Reverence for institutions of the past will not preserve, of itself, an institution that touches every-day life as profoundly as does the law. Legal theory can no more stand as a sacred tradition in the modern world than can political theory. It has been one of the great merits of English law that its votaries have always borne this in mind. When Lord Esher said, "the law of England is not a science," he meant to protest against a pseudo-science of technical rules existing for their own sake and subserving supposed ends of science, while defeating justice.[5] And it is the importance of the rôle of jurors in tempering the administration of justice with common-sense and preserving a due connection of the rules governing every-day relations with every-day needs of ordinary men that has atoned for the manifold and conspicuous defects of trial by jury and is keeping it alive. In Germany to-day one of the problems of law reform is how to achieve a similar tempering of the justice administered by highly trained specialists.[6]

In the other direction, the effect of a scientific legal system upon the courts and upon the legal profession is more subtle and far-reaching. The effect of all system is apt to be petrifaction of the subject systematized. Perfection of scientific system and exposition tends to cut off individual initiative in the future, to stifle independent consideration of new problems and of new phases of old problems, and to impose the ideas of one generation upon another. This is so in all departments of learning. One of the obstacles to advance in every science is the domination of the ghosts of departed masters. Their sound methods are forgotten,

[4]Cf. Lord Herschell's remark to Sir George Jessel: "Important as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting it." Atlay, Victorian Chancellors, II., 460.

[5]See Manson, The Builders of our Law, 398.

[6]Sternberg, Kirchmann und seine Kritik der Rechtswissenschaft, xi.

while their unsound conclusions are held for gospel.[7] Legal science is not exempt from this tendency. Legal systems have their periods in which science degenerates, in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence.

Roman law in its decadence furnishes a striking example. The Valentinian "law of citations" made a selection of jurisconsults of the past and allowed their writings only to be cited. It declared them, with the exception of Papinian, equal in authority. It confined the judge, when questions of law were in issue, to the purely mechanical task of counting and of determining the numerical preponderance of authority.[8] Principles were no longer resorted to in order to make rules to fit cases. The rules were at hand in a fixed and final form, and cases were to be fitted to the rules.[9] The classical jurisprudence of principles had developed, by the very weight of its authority, a jurisprudence of rules; and it is in the nature of rules to operate mechanically.

Undoubtedly one cause of the tendency of scientific law to become mechanical is to be found in the average man's admiration for the ingenious in any direction, his love of technicality as a manifestation of cleverness, his feeling that law, as a developed institution, ought to have a certain ballast of mysterious technicality. "Philosophy's queerest arguments," says James, "tickle agreeably our sense of subtlety and ingenuity."[10] Every practitioner has encountered the lay obsession as to invalidity of a signing with a lead pencil. Every law-teacher has had to combat the student obsession that notice, however cogent, may be disregarded unless it is "official." Lay hair-splitting over rules and regulations goes far beyond anything of which lawyers are capable. Experienced advocates have insisted that in argument to a jury, along with a just, common-sense theory of the merits, one ought to have a specious technicality for good measure. But apart from this general human tendency, there is the special tendency of the lawyer to regard artificiality in law as an end, to hold science something to be pursued for its own sake, to forget in this

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[7]The reasons for this and the laws by which the process takes place are well set forth in Ross, Social Psychology, chaps. 12, 13, 14.

[8]Cod. Theod. I, 4, 3. Karlowa, Römische Rechtsgeschichte, I, 933.

[9]This is said to be the period at which the notion that application of law is a purely mechanical process arose. Gnaeus Flavius (Kantorowicz), Der Kampf um die Rechtswissenschaft, 7.

[10]Pragmatism, 5. Dernburg refers to this as an "innate sense for formalism." Pandekten, I, § 97.

pursuit the purpose of law and hence of scientific law, and to judge rules and doctrines by their conformity to a supposed science and not by the results to which they lead. In periods of growth and expansion, this tendency is repressed. In periods of maturity and stability, when the opportunity for constructive work is largely eliminated, it becomes very marked.

"I have known judges," said Chief Justice Erle, "bred in the world of legal studies, who delighted in nothing so much as in a strong decision. Now a strong decision is a decision opposed to common-sense and to common convenience. * * * A great part of the law made by judges consists of strong decisions, and as one strong decision is a precedent for another a little stronger, the law at last, on some matters, becomes such a nuisance that equity intervenes, or an Act of Parliament must be passed to sweep the whole away." [11]

The instance suggested in the conversation from which the foregoing extract is taken illustrates very well the development of a mechanical legal doctrine. Successive decisions upon the construction of wills had passed upon the meaning of particular words and phrases in particular wills. These decisions were used as guides in the construction of other wills. Presently rules grew up whereby it was settled that particular words and phrases had prescribed hard and fast meanings, and the construction of wills became so artificial, so scientific, that it defeated the very end of construction and compelled a series of sections in the Wills Act of 1836.

I have referred to mechanical jurisprudence as scientific because those who administer it believe it such. But in truth it is not science at all. We no longer hold anything scientific merely because it exhibits a rigid scheme of deductions from *a priori* conceptions. In the philosophy of to-day, theories are "instruments, not answers to enigmas, in which we can rest." [12] The idea of science as a system of deductions has become obsolete, and the revolution which has taken place in other sciences in this regard must take place and is taking place in jurisprudence also. This revolution in science at large was achieved in the middle of the nineteenth century. In the first half of that century, scientific method in every department of learning was dominated by the classical German philosophy. Men conceived that by dialectics and deduction from controlling conceptions they could construe the whole content of knowledge. Even in the natural sciences

[11] Senior, Conversations with Distinguished Persons (Ed. of 1880) 314.
[12] James, Pragmatism, 53.

this belief prevailed and had long dictated theories of nature and of natural phenomena. Linnaeus, for instance, lays down a proposition, *omne vivum ex ovo,* and from this fundamental conception deduces a theory of homologies between animal and vegetable organs.[13] He deemed no study of the organisms and the organs themselves necessary to reach or to sustain these conclusions. Yet, to-day, study of the organisms themselves has overthrown his fundamental proposition. The substitution of efficient for final causes as explanations of natural phenomena has been paralleled by a revolution in political thought. We do not base institutions upon deduction from assumed principles of human nature; we require them to exhibit practical utility, and we rest them upon a foundation of policy and established adaptation to human needs. It has been asserted that to no small extent the old mode of procedure was borrowed from the law. We are told that it involved a "fundamentally juristic conception of the world in which all kinds of action and every sort of judgment was expressed in legal phraseology." [14] We are told that "in the Middle Ages human welfare and even religion was conceived under the form of legality, and in the modern world this has given place to utility." [15] We have, then, the same task in jurisprudence that has been achieved in philosophy, in the natural sciences and in politics. We have to rid ourselves of this sort of legality and to attain a pragmatic, a sociological legal science.

"What is needed nowadays," it has been said, "is that as against an abstract and unreal theory of State omnipotence on the one hand, and an atomistic and artificial view of individual independence on the other, the facts of the world with its innumerable bonds of association and the naturalness of social authority should be generally recognized, and become the basis of our laws, as it is of our life." [16]

Herein is the task of the sociological jurist. Professor Small defines the sociological movement as "a frank endeavor to secure for the human factor in experience the central place which belongs to it in our whole scheme of thought and action." [17] The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than

[13] Philosophia Botanica, aphorisms 134, *et seq.*
[14] Figgis, From Gerson to Grotius, 152.
[15] Ibid., 14.
[16] Ibid., 206.
[17] The Meaning of Sociology, 14 Am. Journ. Sociol. 13.

to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument.

Jurisprudence is last in the march of the sciences away from the method of deduction from predetermined conceptions. On the continent of Europe, both the historical school of jurists and the philosophical school, which were dominant until at least the last quarter of the nineteenth century, proceeded in this way. The difference between them lay in the manner in which they arrived at their fundamental conceptions. The former derived them from the history of juristic speculation and the historical development of the Roman sources. The latter, through metaphysical inquiries, arrived at certain propositions as to human nature, and deduced a system from them. This was the philosophical theory behind the eighteenth-century movement for codification.[18] Ihering[19] was the pioneer in the work of superseding this jurisprudence of conceptions (*Begriffsjurisprudenz*) by a jurisprudence of results (*Wirklichkeitsjurisprudenz*).[20] He insisted that we should begin at the other end; that the first question should be, how will a rule or a decision operate in practice? For instance, if a rule of commercial law were in question, the search should be for the rule that best accords with and gives effect to sound business practice. In the Civil Law, the doctrine as to mistake in the formation of a contract affords an example of the working of the two methods. Savigny treated the subject according to the jurisprudence of conceptions. He worked out historically and analytically the conception of a contract and deduced therefrom the rules to govern cases of mistake. It followed, from his conception, that if *A* telegraphed *B* to *buy* shares and the telegram as delivered to *B* read *sell*, there was no contract between *A* and *B*, and hence no liability of *A* to *B*; and for a time it was so held. But this and some of the other resulting rules were so far from just in their practical operation that, following the lead of Ihering, they have been abandoned and the ordinary understanding of business men has been given effect.[21] And, in this same connection, the new Ger-

[18]See Code of Frederick the Great, part I, Book I, tit. 2, §§ 3, 4.

[19]Der Zweck im Recht (1878); Scherz und Ernst in der Jurisprudenz (1884) especially the two essays "Im juristischen Begriffshimmel" and "Wieder auf Erden."

[20]Sternberg, Allegemeine Rechtslehre, I, 188. See Brütt, Die Kunst der Rechtsanwendung, § 5.

[21]Bernhöft, Bürgerliches Recht (in Birkmeyer, Encyklopädie der Rechtswissenschaft) § 46. Cosack, Lehrbuch des Deutschen bürgerlichen Rechts, I, § 64 (3 Ed. pp. 213-214), BGB, §§ 120, 122.

man code has introduced, as a criterion of error in the content of an expression of the will, the question, what would be regarded as essential in the ordinary understanding of business.[22] Even better examples of the workings of a jurisprudence of conceptions, for our purposes, may be found in the manner in which common-law courts have dealt with points of mercantile law. For instance, the law of partnership is made difficult and often unjust by the insistence of the courts upon deducing its rules from a conception of joint ownership and joint obligation, instead of ascertaining and giving effect to the actual situation as understood and practiced by merchants. The legal theory does not affect the actual course of business an iota. But it leads to unfortunate results when that course of business, for some reason, comes before the courts.[23] Again, the refusal of Lord Holt to recognize the negotiability of promissory notes[24] proceeded upon a deduction from the conception of a chose in action. A jurisprudence of ends would have avoided each of these errors.

In periods of legal development through juristic speculation and judicial decision, we have a jurisprudence of ends in fact, even if in form it is a jurisprudence of conceptions.[25] The Roman *jus gentium* was worked out for concrete causes and the conceptions were later generalizations from its results. The *jus naturale* was a system of reaching reasonable ends by bringing philosophical theory into the scale against the hard and fast rules of antiquity. The development of equity in England was attained by a method of seeking results in concrete causes. The liberalizing of English law through the law merchant was brought about by substituting business practice for juridical conceptions. The development of the common law in America was a period of growth because the doctrine that the common law was received only so far as applicable led the courts, in adapting English case-law to American conditions, to study the conditions of application

[22]BGB, § 119, Saleilles, De la déclaration de la volonté, § 2, Leonhard, Der Irrtum als Ursache nichtiger Verträge (2 Ed.), II, 178.

[23]Lindley, Partnership (7 Ed.) 4.

[24]Buller *v.* Crips (1703) 6 Mod. 29. Compare modern decisions as to presentment of checks through a clearing house. Holmes *v.* Roe (1886) 62 Mich. 199; Edmiston *v.* Herpolsheimer (1901) 66 Neb. 94. In the former case we are told gravely that "the clearing house and the method of doing business through it had no bearing" on the case!

[25]See, for instance, Modestinus in Dig. I, 3, 25. As Stammler says: "It is notoriously a fundamental property of the classical Roman law to have shown itself exceedingly elastic in its substance, without thereby materially injuring the sharpness and certainty of its conceptions and rules." Wirthschaft und Recht (2 Ed.) 175.

as well as the conceptions and their logical consequences. Whenever such a period has come to an end, when its work has been done and its legal theories have come to maturity, the jurisprudence of conceptions tends to decay. Conceptions are fixed. The premises are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules. This is the condition against which sociologists now protest, and protest rightly.[26]

A period of legislative activity supervenes to supply, first new rules, then new premises, and finally a systematic body of principles as a fresh start for juristic development. But such periods hitherto have not been periods of growth. Usually legislative activity has not gone beyond the introduction of new rules or of new premises, and the chief result has been a summing up of the juristic accomplishment of the past in improved form. The further step, which is beginning to be taken in our present era of legal development through legislation, is in reality an awakening of juristic activity, as jurists perceive that they may effect results through the legislator as well as through the judge or the doctrinal writer. This step has yet to be taken outside of Germany. And in the first and second stages of a period of legislation the mechanical character of legal science is aggravated by the imperative theory, which is a concomitant of legislative activity. Austin's proposition that law is command so complete that even the unwritten law must be given this character, since whatever the sovereign permits he commands, was simply rediscovered during the legislative ferment of the reform-movement in English law. In the flowering-time of Papal legislation the canon law had already asserted it.[27] Moreover, a period of legislation and codification has brought German jurists to a like conclusion.[28] At such times, when law is felt to be positive, to be the command of the law-maker, a tendency to enact rules as such becomes manifest. Roman law, in its period of legislation, can furnish more than one example of the sort of law-making of which we complain to-day.[29]

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[26]See Professor Henderson, 11 Am. Journ. Sociol. 847.

[27]c. I in Vito de Constitutionibus (I, 2).

[28]Czyhlarz, Institutionen, § 4.

[29]e. g. The legislation of Claudius, permitting marriage with a brother's daughter, Gaius, I, 61; imperial legislation as to testaments, Dig. XXIX, I, 1, pr., Code VI, 23; the *beneficium diuisionis* in suretyship, Dig. XLVI, I, 26-27, which has given so much trouble in modern law and is being rejected in recent codes. Dernburg, Lehrbuch des Preussischen Privatrechts, II, § 2466; Dernburg, Das bürgerliche Recht, III, § 162; Baudry-Lacantinerie, Traité de droit civil (2 Ed.), XXI, § 1053, *et seq.* Compare also the imperial legislation as to the making and revocation of gifts and Justinian's legislation as to revocation for ingratitude of the donee. Inst. II, 7, § 2; Cod. Theod. VIII, 12, 3, 5, and VIII, 12, 5; Code V, 12, 31; Code VIII, 54, 34; Code VIII, 56, 10.

Before the analytical school, which revived the imperative theory to meet the facts of an age of legislation, had become established, historical jurists led a revolt. But their jurisprudence is a jurisprudence of conceptions. Moreover, they have had little effect upon the actual course of Anglo-American law. The philosophical jurists have protested also and have appealed from purely legal considerations to considerations of reason and of natural law. But theirs, too, is a jurisprudence of conceptions, and their method, of itself, offers no relief. Their service has been in connection with the general sociological movement, in giving natural law a new and a modern aspect, and in promoting a general agreement among jurists on a sociological basis. In Europe, it is obvious that the different schools are coming together in a new sociological school that is to dominate juristic thought. Instead of seeking for an ideal universal law by metaphysical methods, the idea of all schools is to turn "the community of fact of mankind into a community of law in accord with the reasonable ordering of active life." [30] Hence they hold that "the less arbitrary the character of a rule and the more clearly it conforms to the nature of things, the more nearly does it approach to the norm of a perfect law." [31] The utilitarian theory of Bentham was a theory of legislation.[32] The sociological theory of the present is a theory of legal science. Probably the chief merit of the new German code lies in its conformity in so large a degree to this theory.[33] It lays down principles from which to deduce, not rules, but decisions; and decisions will indicate a rule only so long as the conditions to which they are applied cause them to express the principle. This, and not lax methods of equitable application,[34] into which American courts are falling so generally, is the true way to make rules fit cases instead of making cases fit rules.[35]

An efficient cause of the failure of much American legislation is that it is founded on an assumption that it is enough for the State to command. Legislation has not been the product of preliminary study of the conditions to which it was to apply. It has not expressed social standards accurately. It has not responded

[30] Jitta, La substance des obligations dans le droit international privé, I, 18.

[31] Baty, A Modern *Jus Gentium*, 20 Juridical Review, 109.

[32] This is pointed out very clearly by Maine, Early History of Institutions, Lect. xii.

[33] e. g. BGB, § 242.

[34] See my address, "Enforcement of Law," 20 Green Bag, 401.

[35] Lord Westbury had this idea. Atlay, Victorian Chancellors, II, 259.

accurately to social needs. Hence a large proportion has been nugatory in practice. But the difficulty is not, as some have assumed, that matters of private law are not within the legitimate scope of legislation.[36] It is rather that legislation has approached them upon a false theory. Judicial law-making also has acted upon an erroneous theory; and its results are often quite as much disregarded in practice as are statutes.[37] Judicial law-making, however, cannot escape, except within very narrow limits, until it is given a new starting point from without. Legislative law-making, on the contrary, may do so and is beginning to do so.

That our case law at its maturity has acquired the sterility of a fully developed system, may be shown by abundant examples of its failure to respond to vital needs of present-day life. Its inadequacy to deal with employers' liability;[38] the failure of the theory of "general jurisprudence" of the Supreme Court of the United States to give us a uniform commercial law; the failure of American courts, with centuries of discussion before them, to work out a reasonable or certain law of future interests in land; the breakdown of the common law in the matter of discrimination by public service companies because of inability to make procedure enforce its doctrines and rules; its breakdown in the attempt to adjust water rights in our newer states, where there was opportunity for free development;[39] its inability to hold promoters to their duty and to protect the interests of those who invest in corporate enterprises against mismanagement and breach of trust;[40] its

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[36]Carter, Law, Its Origin, Growth and Function, 3.

[37]See my paper, "Common Law and Legislation," 21 Harv. Law Rev. 383, 406, note. The recent reversal by the House of Lords of a Scotch case (Toal *v.* North British R. Co. [1908] 16 Scot, L. T. 69) in which the Court of Session spoke "*ex cathedra* as to the right management of a railway train," assuming "an exhaustive knowledge of the whole art of train and railway-platform management," calls attention to a type of judicial law-making which endeavors to dictate rules for practical affairs by deduction from juristic conceptions. Legislation intended to turn questions of negligence over to juries for all purposes, now becoming somewhat common, is a crude attempt to counteract the same judicial tendency in our American law of torts.

[38]See a layman's view in the two articles of Mr. Hard, in "Everybody's" for September and October, 1908.

[39]See Long, Irrigation, § 99.

[40]For instance, compare Old Dominion Copper Mining and Smelting Co. *v.* Lewisohn (1908) 28 Sup. Ct. Rep. 634 with Old Dominion Copper Mining & Smelting Co. *v.* Bigelow (1905) 188 Mass. 315. In this connection note also the reactionary course of the courts in the matter of payment for shares. After starting out to deal with the matter on the ground of public policy, they came finally to treat it wholly from the standpoint of estoppel, and put the assets of a corporation in the same position as those of a natural person. Hospes *v.* Northwestern Mfg. Co. (1892) 48 Minn. 174; Clark *v.* Beaver (1890) 139 U. S. 96; Handley *v.* Stutz (1891) 139 U. S. 417; Fogg *v.* Blair (1890) 139 U. S. 118.

failure to work out a scheme of responsibility that will hold legal entities, or those who hide behind their skirts, to their duty to the public—all these failures, and many more might be adduced, speak for themselves. But compare these failures with the great achievements of the youth of our case-law, with Lord Mansfield's development of a law of quasi-contracts from the fictions of the common counts, with Lord Mansfield's development of mercantile law by judicial decision, with Kent's working out of equity for America from a handful of English decisions, with Marshall's work in giving us a living constitution by judicial interpretation. Now and then, at present, we see vigorous life in remote corners of our case law, as, for instance, in the newer decisions as to surface and underground waters. But judicial revolt from mechanical methods to-day is more likely to take the form of "officious kindness" and flabby equitable application of law.[41] Our judge-made law is losing its vitality, and it is a normal phenomenon that it should do so.

I have suggested some examples of the failure of our case law to rise to social and legal emergencies. Let me point to some phases of its active operation which lead to the same conclusion.[42]

The manner in which the Fourteenth Amendment is applied affords a striking instance of the workings to-day of a jurispru-

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[41]See my address, "Enforcement of Law," 20 Green Bag, 401.

[42]Numerous examples from our private substantive law might easily be adduced, e. g., to take those that are first at hand, the curious inability of courts to reach a common-sense result, demanded also by principles of law, in cases of contributory negligence of one of several beneficiaries under Lord Campbell's Act, because of hard and fast procedural conceptions (see Wigmore, Contributory Negligence of the Beneficiary as a Bar to an Administrator's Action for Death, 2 Illinois Law Rev. 487); the narrow and unjust application of Lord Campbell's Act, in many of our State courts, where aliens are beneficiaries (Deni *v.* Pennsylvania R. Co. [1897] 181 Pa. St. 525; Brannigan *v.* Union Gold Mining Co. [1899] 93 Fed. Rep. 164; McMillan *v.* Spider Lake Saw Mill & Lumber Co. [1902] 115 Wis. 332; Roberts *v.* Great Northern R. Co. [1908] 161 Fed. Rep. 239), due for the most part to mechanical deduction from a conception of the universality of common-law doctrines and the necessity of strict construction of everything in derogation thereof, and the mechanical doctrine in New York as to jurisdiction over transitory actions between non-residents which accrued abroad (Collard *v.* Beach [1904] 81 App. Div. 582, 93 App. Div. 389) as compared with the just and flexible rule adopted in England (Logan *v.* Bank of Scotland [1906] 1 K. B. 141, 150).

Criminal procedure is full of instances that will occur to everyone. Not the least striking is our application of the rule as to double jeopardy in the form in which it arose when no appeal was allowed in criminal causes, so as to cut off appeal by the State after appeal by the accused had been allowed. In criminal law, an interesting example may be seen in the judicial demand that medical experts furnish "a definite account of the course of symptoms collectively constituting the disease" of insanity. Mercier, Criminal Responsibility, 88.

dence of conceptions. Starting with the conception that it was intended to incorporate Spencer's Social Statics in the fundamental law of the United States,[43] rules have been deduced that obstruct the way of social progress.[44] The conception of liberty of contract, in particular, has given rise to rules and decisions which, tested by their practical operation, defeat liberty.[45] As Mr. Olney says of the *Adair* Case,[46] "it is archaic, it is a long step into the past, to conceive of and deal with the relations between the employer in such industries and the employee, as if the parties were individuals." [47] The conception of freedom of contract is made the basis of a logical deduction. The court does not inquire what the effect of such a deduction will be, when applied to the actual situation. It does not observe that the result will be to produce a condition precisely the reverse of that which the conception originally contemplated.[48] Again, the Commerce Clause of the Federal Constitution has been taken by one judge, at least, to be a constitutional enactment of a conception of free trade among the states.[49] Deductions from this and like conceptions, assumed to express the meaning and the sole meaning of the clause, have given us rules which, when applied to the existing commercial and industrial situation, are wholly inadequate.[50]

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[43]Holmes, J., in Lochner *v.* New York (1905) 198 U. S. 45, 75.

[44]See Professor Henderson in 11 Am. Journ. Sociol. 847.

[45]I have cited some of these in my paper, "Do we Need a Philosophy of Law?" 5 COLUMBIA LAW REV. 339, 345. Cf., the dissenting opinion of Holmes, J., in Adair v. United States (1908) 208 U. S. 161.

[46](1908) 208 U. S. 161.

[47]42 Am. Law Rev. 164.

[48]One might cite in this connection the classical remarks of Maule, J., to the prisoner whom he was sentencing for bigamy. When he had explained to the prisoner how, after years of litigation and the expenditure of hundreds of pounds, he might have obtained a divorce (under the then law), he proceeded: "and if you ask me where you were to get all this money and tell me you never in your life had so many pennies at one time, I must remind you that it hath ever been the glory of the law of England not to have one law for the rich and another for the poor." See James, Curiosities of Law and Lawyers, 317.

[49]This conception appears very clearly in the opinions of the present Chief Justice from Leisy *v.* Hardin (1889) 135 U. S. 100, 109, down to the concurring opinion of Peckham, J., in which the Chief Justice joined, in Howard *v.* Illinois C. R. Co. (1908) 207 U. S. 463. In the latter, an opinion is indicated that Congress can not legislate upon the relation of master and servant involved in interstate traffic. Of course, this is a necessary deduction from the free-trade conception of the Commerce Clause.

[50]Compare the abstract and impracticable distinction between interstate and intrastate activities of employees of railways engaged in both species of commerce indiscriminately, upon which the court proceeds in Howard *v.* Illinois C. R. Co., *supra,* with the pragmatic view taken by Judge Amidon in his paper, "The Nation and the Constitution", Proc. Am. Bar Assn. xxi, 463, 474-5.

Procedure, with respect to which every thoughtful lawyer must feel that we are inexcusably behind the rest of the English-speaking world, suffers especially from mechanical jurisprudence. The conception of a theory of the case, developed by the common-law forms of action, has, in nearly half of our code jurisdictions, nullified the legislative intent and made the practice more rigid than at common law.[51] But this conception is regarded by many as fundamental. In deductions from this conception they lose sight of the end of procedure, they make scientific procedure an end of itself, and thus, in the result, make adjective law an agency for defeating or delaying substantive law and justice instead of one for enforcing and speeding them. Aristotle discusses a project of a Greek reformer for enabling tribunals to render what he called a divided judgment. At that time, the judgment had to be absolute one way or the other. If a plaintiff claimed twenty *minæ* when but eighteen were proved to be due him, there was no course but to find for the defendant. The proposal to correct this and to allow a finding for the eighteen *minæ* due did not meet with Aristotle's approval. He said:

"A juror who votes acquittal decides, not that the defendant owes nothing, but that he does not owe the twenty *minæ* claimed."[52]

We smile now at Aristotle's hard and fast deduction, in the face of a manifestly absurd result, from his conception of the trial of an issue. But at least half our jurisdictions do the same thing essentially in this matter of the theory of a plaintiff's case. That his pleadings and proofs disclose a case and a good case is not enough. The courts say they are not foreclosing that case; they are merely deciding upon the theory he has chosen to advance.

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[51]Mescall *v.* Tully (1883) 91 Ind. 96; Carbondale Inv. Co. *v.* Burdick (1903) 67 Kan. 329; Maguire *v.* Vice (1855) 20 Mo. 429; Rust *v.* Brown (1890) 101 Mo. 586; Supervisors of Kewaunee County *v.* Decker (1872) 30 Wis. 624; Dessert Lumber Co. *v.* Wadleigh (1899) 103 Wis. 318. See Barnes *v.* Quigley (1874) 59 N. Y. 265; Goelet *v.* Asseler (1860) 22 N. Y. 225; Anderson *v.* Chilson (1895) 8 S. D. 64; Casey *v.* Mason (1899) 8 Okl. 665.

In Mescall *v.* Tully, the Court says: "It is an established rule of pleading that a plaintiff must proceed upon some definite theory, *and on that theory the plaintiff must succeed or not succeed at all.* * * * The theory upon which the complaint is constructed is that the parol agreement transformed the deed from an absolute conveyance into an instrument creating a trust, and as this theory is overthrown by the authorities, the entire complaint is foundationless. This theory is the foundation of the complaint, and, as that falls away, the whole pleading must go down." The plaintiff must now begin over again on another *theory* of the same facts.

As a consequence of such decisions, "the distinction between trover and assumpsit is to-day even more rigidly observed than under the common-law practice." W. B. Hornblower, quoted in 2 Andrews, American Law (2 Ed.) § 635, n. 29.

[52]Politics, ii, 8.

Again, in the practice as to parties, the common-law conception that there must be a joint interest or a joint liability, because there must be one controversy and joint parties are as one party, has seriously interfered with the liberal plan of the framers of the original Code of Civil Procedure. I can only cite some of the cases.[53] But let me compare with our American cases a recent English decision.[54] In that case two plaintiffs sued for an injunction against infringement of copyright and for an accounting of profits. Only one was owner of the copyright; the other was a mere licensee. But which one was owner was not clear. The court did not deem it necessary to take up this question and determine whether one only was owner and if so which, although a money recovery was to be had. So long as the plaintiffs were agreed among themselves and the defendant had wronged and owed money to one or the other of them, it affirmed a decree for an injunction and accounting. Although in strictness it might be that only *one* was entitled to judgment and so it would be necessary to determine *which* one, the court wasted no time on that question so long as nothing turned on it.[55] Here the court was conscious that procedure was a mere means. It strove to vindicate the substantive law. It was not set upon adhering with scrupulous exactness to logical deductions from a conception of adjective law at the expense of the merits the latter exists to give effect to.

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[53]Voorhis *v.* Childs (1858) 17 N. Y. 354; Union Bank *v.* Mott (1863) 27 N. Y. 633; Borden *v.* Gilbert (1861) 13 Wis. 750; Phillips *v.* Flynn (1880) 71 Mo. 424; Setton *v.* Casseleggi (1883) 77 Mo. 397; Trowbridge *v.* Forepaugh (1869) 14 Minn. 133.

[54]Macmillan & Co. *v.* Dent [1907] 1 Ch. 107, 113.

[55]A like sensible conclusion was reached in Louisville N. A. & C. R. Co. *v.* Lange (1895) 13 Ind. App. 337. But see the usual treatment of this matter in America illustrated in Prestwood *v.* McGowin (1900) 128 Ala. 267; Glore *v.* Scroggins (1905) 124 Ga. 922; State *v.* Beasley (1894) 57 Mo. App. 570; Goodnight *v.* Goar (1868) 30 Ind. 418; McIntosh *v.* Zaring (1898) 150 Ind. 301; Blewett *v.* Hoyt (N. Y. 1907) 118 App. Div. 227. In the last case cited the court says the defect is fatal, "though somewhat technical." Even where a more liberal view is taken, the court must find out *which* is entitled, render judgment for him, and dismiss as to the other. Cf. Gillespie *v.* Gouley (Cal. 1908) 93 Pac. 856. Hence, in a case like Macmillan & Co. *v.* Dent, *supra,* if the trial court hit on the wrong one, a reversal would follow, though no harm was done.

Perhaps the acme of technicality was reached in Wisconsin. There a statute gave permission to courts, in their discretion, to render judgment *against* one or more defendants and allow the cause to proceed as to others. The court said: "The judgment appealed from it not *against* but in *favor* of, certain defendants, and therefore does not come within the statutory permission to vary from the general rule." Egaard *v.* Dahlke (1901) 109 Wis. 366, 369. Although there may be no case against these parties and the plaintiff may not be harmed in any way by terminating the cause as to them, the etiquette of justice requires them for the final judgment, and the plaintiff may reverse the judgment in their favor.

Trial procedure is full of mechanical jurisprudence born of deduction from conceptions. The decisions as to the effect of a view of the *locus* by a jury, in which judgments are reversed unless jurors are told, in the face of common-sense, not to use what they see as evidence, in order to vindicate a conception of the duty of a court of review;[56] the wilderness of decisions as to the province of court and jury, in which, carrying a conception of distinction between law and fact to extreme logical results, the courts at one moment assume that jurors are perfect and will absolutely follow an abstract instruction to its logical consequences, in the face of common-sense and the evidence, and at the next assume that they are fools and will be misled by anything not relevant that drops from the court;[57] and the practice of instructions, one way or the other, when doubtful points of law arise, a general verdict, and a new trial, if the court of review takes another view of the point, when the verdict could have been taken quite as well subject to the point of law reserved, and a new trial obviated,[58] illustrate forcibly the extent to which procedural conceptions, pursued for their own sake, may defeat the end of procedure and defeat the substance of the law. For delay of justice is denial of justice. Every time a party goes out of court on a mere point of practice, substantive law suffers an injury. The life of the law is in its enforcement.

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[56]Chute *v.* State (1872) 19 Minn. 271; Close *v.* Samm (1869) 27 Ia. 503; Sasse *v.* State (1887) 68 Wis. 530; Machader *v.* Williams (1896) 54 Ohio St. 344; Neff *v.* Reed (1884) 98 Ind. 341. There is a strong tendency to get away from this rule at present. Compare Wright *v.* Carpenter (1875) 49 Cal. 607, with People *v.* Milner (1898) 122 Cal. 171.

[57]See Judge Thompson's observations in the Preface to his Law of Trials, xi.

[58]In the discussion of this matter at the meeting of the American Bar Association meeting at Seattle (August, 1908), many thought reservation of the point and judgment thereon, if required, in the court of review, involved subversion of trial by jury. Mr. Johnston seems also to have this idea. Law Notes, xii, 130. He can conceive no middle ground, where a question of the measure of damages arises, between requiring the trial judge to choose one of two theories and charge the jury accordingly, sending the cause back for a complete new trial, if the court of review chooses the other, and allowing the court of review to determine the *quantum* of damages for itself. To require the trial court to take a finding on each theory and choose in the final judgment seems to infringe upon the necessity of a decisive finding *in form* by the jury. This is mechanical jurisprudence indeed. But when one may solemnly argue that reversing the presumption of prejudice from errors of procedure will require assessment of damages by a court of review, and assume that a statute making such change must be applied in a mechanical fashion to defeat its end, it is evident that a deep-rooted professional obsession that mechanical procedure is fundamentally inherent in law has to be reckoned with.

Evidence also has been a prolific field for the unchecked jurisprudence of conceptions. But one example must suffice. The decisions by which in a majority of jurisdictions jurors are not permitted to learn directly the views of standard texts upon scientific and technical subjects, but must pass upon the conflicting opinions of experts without the aid of the impartial sources of information to which any common-sense man would resort in practice, carry out a conception of the competency of evidence at the expense of the end of evidence.[59] In one case,[60] the question was whether death had taken place from strangulation. The trial was held in a rural community, and the medical experts accessible had had no actual experience of cases of strangulation of the sort involved. But standard medical works did relate cases precisely in point, and, after proof that they were standard authorities, a physician was allowed to testify with respect to the symptoms disclosed in the light of the recorded experience of mankind. For this, the judgment was reversed.[61] To vindicate a juridical conception, the court shut out the best possible means of information, in the circumstances of the case in hand, and allowed an accused person to escape because of the inevitable limits of experience of a rural physician.

How far the mechanical jurisprudence, of which the example just given is an extreme case, forgets the end in the means, is made manifest by the stock objection to attempts at introducing a common-sense and business-like procedure. We are told that formal and technical procedure "makes better lawyers." [62] One might ask whether the making of good lawyers is the end of law. But what is a good lawyer? Let Ulpian answer:

"Ius est ars boni et æqui. Cuius merito quis nos sacerdotes appellet; iustitiam namque colimus et boni et æqui, notitiam profitemur, æquum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu pœnarum, verum etiam præmiorum quoque exhortatione efficere cupientes veram, nisi fallor, philosophiam, non simulatam affectantes."[63]

The nadir of mechanical jurisprudence is reached when conceptions are used, not as premises from which to reason, but as

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[59]See the excellent critical discussion in 3 Wigmore, Evidence, §§ 1690-1700.

[60]Boyle *v.* State (1883) 57 Wis. 472.

[61]This decision has received the approval of the United States Circuit Court of Appeals, Union P. R. Co. *v.* Yates (1897) 79 Fed. Rep. 584.

[62]Cf. also the remarks of Lord Halsbury in Clydesdale Bank *v.* Patton [1896] A. C. 381.

[63]Dig. I, 1, 1.

ultimate solutions. So used, they cease to be conceptions and become empty words. James has called attention to a like vice in philosophical thought:

"Metaphysics has usually followed a very primitive kind of quest. You know how men have always hankered after unlawful magic, and you know what a great part in magic *words* have always played. If you have his name, or the formula of incantation that binds him, you can control the spirit, genie, afrite, or whatever the power may be. * * * So the universe has always appeared to the natural mind as a kind of enigma of which the key must be sought in the shape of some illuminating or power-bringing word or name. That word names the universe's *principle*, and to possess it is after a fashion to possess the universe itself. 'God,' 'Matter,' 'Reason,' 'the Absolute,' 'Energy,' are so many solving names. You can rest when you have them. You are at the end of your metaphysical quest."[64]

Current decisions and discussions are full of such solving words: estoppel, malice, privity, implied, intention of the testator, vested and contingent,—when we arrive at these we are assumed to be at the end of our juristic search. Like Habib in the Arabian Nights, we wave aloft our scimitar and pronounce the talismanic word.

With legislative law-making in the grip of the imperative theory and its arbitrary results, and judicial decision in the grip of a jurisprudence of conceptions and its equally arbitrary results, whither are we to turn? Judicial law-making cannot serve us. As things are, the cure would be worse than the disease.[65] No court could hold such hearings as those had by legislative committees upon measures for the protection of operatives, described by Mrs. Kelley,[66] or that recently had before the Interstate Commerce Commission as to uniform bills of lading.[67] We must soon have a new starting-point that only legislation can afford. That we may put the sociological, the pragmatic theory behind legislation, is demonstrating every day. Legislative reference bureaus, the Comparative Law Bureau, the Conferences of Commissioners on Uniform State Laws, such hearings as the one before the Interstate Commerce Commission already referred to, hearings before legislative committees, such conferences as the one held recently

[64]Pragmatism, 52.

[65]Fortunately, even the layman recognizes this. Ross, Social Psychology, 333.

[66]Some Ethical Gains Through Legislation, 156.

[67]See Appendix to Report of Committee on Commercial Law at the Eighteenth Conference of Commissioners on Uniform State Laws.

with respect to the Sherman Anti-trust Law, bar-association discussions of reforms in procedure,—all these are furnishing abundant material for legislation of the best type. No such resources are open to the courts. Hence common-law lawyers will some day abandon their traditional attitude toward legislation; will welcome legislation and will make it what it should be. The part played by jurists in the best days of Roman legislation,[68] and the part they have taken in modern Continental legislation, should convince us, if need be, that juristic principles may be recognized and juristic speculation may be put into effect quite as well by legislation as by judicial decision.

Herein is a noble task for the legal scholars of America. To test the conceptions worked out in the common law by the requirements of the new juristic theory,[69] to lay sure foundations for the ultimate legislative restatement of the law, from which judicial decision shall start afresh,—this is as great an opportunity as has fallen to the jurists of any age.[70] The end of a period of development by judicial decision is marked by the prevalence of two types of judges; those who think it a great display of learning and of judicial independence to render what Chief Justice Erle called "strong decisions," and those who fix their gaze upon the raw equities of a cause and forage in the books for cases to sustain the desired result. But the task of a judge is to make a principle living, not by deducing from it rules, to be, like the Freshman's hero, "immortal for a great many years," but by achieving thoroughly the less ambitious but more useful labor of giving a fresh illustration of the intelligent application of the principle to a concrete cause, producing a workable and a just result. The real genius of our common law is in this, not in an eternal case-law.

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[68]Hofmann, Kritische Studien im römischen Rechte, Essay I.

[69]One of the cardinal points of the doctrine of sociological jurists is that it is enough to work out such rules as may clearly govern particular facts or relations without being over-ambitious to lay down universal propositions. Jitta, op. cit. I, 20. Doubtless courts have been led into excess of zeal to lay down universal propositions by having to do in the past so much of the rightful work of legislatures. But at an earlier period, when conceptions were not so thoroughly worked out and rules were not so numerous, there was always before them the practical problem of devising new theories for a concrete cause. To-day the principles are hidden by the mass of rules deduced from them, and, as these rules are laid down as and taken to be universal, not mere expressions for the time being of the principles, we have an administration of justice by rules rather than by principles. Legislative superseding of this mass of rules by well-chosen and carefully formulated principles seems to offer the surest relief.

[70]The restating and rationalizing of our law of partnership upon which Professor Ames is engaged for the Commissioners on Uniform State Laws is a striking example.

Let the principles be formulated by whom or derived from whence you will. The Common Law will look to courts to develop and expound them, the Civil Law to doctrinal treatises. It is only a lip service to our common law that would condemn it to a perpetuity of mechanical jurisprudence through distrust of legislation.

ROSCOE POUND.

CHICAGO.

LIABILITY FOR WASTE.

II.

The Modern English Doctrine.

Like every other science the law grows by differentiation. Its progress is marked by the resolution of a general principle into its particulars, by the recognition of distinctions which were previously merged in a wider generalization. Some such process we may dimly observe in the law governing permissive waste. Attention has been called to the fact that the earlier law made no distinction among the various kinds of non-feasance comprehended under that general expression.[1] But it is obvious to the moral sense that there is a wide difference between the neglect of the tenant who permits the premises in his possession to deteriorate silently and imperceptibly under the influence of time and weather and that of him who invites the sea to enter through a breach in the sea-wall which guards the estate, and that there is no real comparison between the default of the lessee through whose negligent handling of a lamp or fire the house is consumed and that of him whose barn or dwelling is destroyed by a midnight incendiary or by a mob. That the law must sooner or later recognize these differences in moral obligation as involving a difference in legal obligation seems clear enough to us now. Perhaps our legal forbears would have had as little difficulty in recognizing it but for certain considerations of public policy which must have pressed upon them more strongly than they do upon us. At least it is not for us, living under the settled conditions of the twentieth century, to say that the conditions of life in the thirteenth and fourteenth centuries did not render it necessary or desirable to hold the tenant for life or years in the position of a virtual insurer of the premises entrusted to his custody. As in the instance of the innkeeper and of the common carrier, he was exempted from liability for destruction occasioned by the act of God or of the public enemy—cases in which he was clearly free from fault—but, as in those instances also, the law made no attempt to refine upon the multitudinous occasions of waste that lay outside those obvious categories. For destruction by accidental fire or through the act of an incendiary the tenant might or might not

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[1]Page 436, *supra*.

be at fault. Certainly in "those troublesome and dangerous times" (to employ Lord Coke's description of a later period in English history)[2] the "want of a good watch"[3] might well be accounted a serious default on the part of a tenant in possession.

There is danger, ever present, of building too large a superstructure of theory upon a slender foundation of authority. Here as elsewhere in our excursions into that forest primeval of the Year Books, we are forced to content ourselves with faint and elusive gleams. Our cases are but a handful, and these imperfectly reported. But, walking by the best light that we can gain, the assertion may be ventured that, with the lapse of years and the growing amelioration of life, there was manifested an increasing disinclination to subject tenants for life or years to the grievous penalties of the Statute of Gloucester for permissive waste, especially for waste committed, without the lessee's default, by a stranger. The case in 21 Edw. I, previously referred to,[4] in which an inquest was ordered to inquire whether the tenant was to blame for the fire by which the premises were destroyed,[5] represents a sentiment which, we may well believe, found frequent expression.[6] Not, it is true, in reported cases: the comparative dearth of authority on the point has already been adverted to; but rather in the absence of cases in which the tenant's liability for unavoidable waste was affirmed.

There was in the meantime abundant law of waste. The formidable array of cases in Fitzherbert's Abridgement[7] and the amount of space devoted to the subject by Coke[8] are a sufficient

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[2]Co. Lit. 272, a.

[3] See the anonymous case in Fitz. Abr. Wast, pl. 30, referred to, p. 436, *supra;* the case is reported Y. B. (Rolls Series) 19 Edw. III, 194 (1345).

[4]Page 437, *supra.*

[5]The order was as follows: "If the sheriff hold the inquest and return that the grange and bakehouse were burned by an accident and do not say whether the burning was caused by the default of the tenant, let the sheriff be directed again to inquire whether the burning was due to the default of the tenant or not; and if he return that it was by the default of the tenant he (the plaintiff) will recover his damages."

[6]In a case some fifty years later (1346), the lessee urged that the houses in which the waste was alleged had been burnt by misfortune (*par infortune*), which "could not be called waste," to which it was reported that it had been found that they were burned for want of proper care (*par defaut de garde*). Y. B. (Rolls Series) 20 Edw. III, 406, 410. To the same effect see Fitz. Abr. Wast, 123 (*temp.* Edw. I) where the plea of accidental fire was met by the question *"par quel mischauns?"*, and the case from 9 Edw. II, referred to by Coke (2 Inst. 302), where it was held (*semble*) that burning by thieves "without evil keeping of lessee's fire" is no waste.

With this agrees Fleta, Lib. I, c. 12, s. 20: *"Fortuna autem ignis vel hujusmodi eventus inopinati omnes tenentes excusat."*

[7]Fitzherbert gives 148 cases, covering about 200 years (1287-1501).

[8]Co. Lit. 52b-54b; 355, a, b; 2 Inst. 144-146; 298-306; 327-329; 389-390; Bowles's Case (1615) 11 Co. Rep. 79; Liford's Case (1614) *ibid.* 46; Herlakenden's Case (1589) 4 *ibid.* 62, a. "I have been the more spacious concerning this learning of waste, because it is most necessary to be known of all men." Co. Lit. 54, b.

indication of this. It is only the law of innocent waste which has diminished to the vanishing point. By the end of the fourteenth century we can say, with a fair degree of confidence, that it has wholly disappeared. How is this complete disappearance of a large class of cases of permissive waste to be accounted for? Surely not for lack of instances. Riot and arson and malicious mischief and careless neighbors are not modern inventions. Nor can we assume that the landlords of that day were too tender-hearted to enforce the statutory liability against an innocent tenant. Whether the jury of that day learned to play the rôle, now so palpably exercised by its modern successor, of mitigating the rigors of an unjust law by refusing to convict, or whether the courts boldly adopted the principle that the responsibility of the tenant for accidental waste must be made to appear, all that we can be sure of is that the severe provisions of the Statute have resulted in narrowing the field of permissive waste to cases in which the lessee is shown to be at fault. This conclusion is, of course, entirely consistent with the cases, still comparatively numerous, in which the tenant is held liable for destruction caused by his failure to guard against preventable accident, whether due to the act of God or of men or of the beasts of the field. Clearly it is a default, a violation of the duty which his exclusive right of possession imposes upon the lessee, to permit the house to fall "*pro defectu sustentationis*", to leave the meadow unprotected from the river or the sea, to leave the strange woman whom the house harbors to set it ablaze, to fail to fence the wood against cattle, etc., etc., and we shall not be surprised to find that, in the period under review, the indulgence of the courts was never extended to cases of that kind. It is strictly in accord with this principle of liability, also, that the tenant shall be held accountable for the waste committed by his household, whether children[9] or servants[10] or guests,[11] as well as by his under-tenant.[12]

It is an interesting corollary of this process of legal development that it renders illusory and meaningless the old distinction between waste resulting from the act of God or the public enemy and that due to other causes. The distinction is valid enough if it be assumed that for permissive waste resulting from other causes the tenant is liable in any event and for that due to the

[9]Fitz. Abr. Wast, 32 (20 Edw. III).
[10]*Ibid.* 81 (41 Edw. III).
[11]*Ibid.* 30 (19 Edw. III, 194).
[12]Y. B. 12 Edw. III, 376.

act of God, etc., in no event. But let it once be recognized that in either case his liability flows wholly from his own default and the distinction disappears. For our authorities make it clear that even the act of God will not excuse a tenant whose neglect of duty has called the powers of nature into operation or placed the premises at their mercy. Thus, in a case in 44 Edw. III,[13] to the defendant's plea that a certain farm building was prostrated by a tempest (*par le grande vent*) it was answered and adjudged that this was no defense, the destruction being invited by neglect to roof the building (*pour defaute de couverture*). To the same effect are the numerous cases in which the tenant's failure to keep up the sea-wall or to maintain the river-dyke lent destructive force to the violence of the sea or torrent.[14] While Coke's belated exposition of permissive waste is doubtless responsible for the current view that the tenant was liable, irrespective of his own default, for the acts of a stranger,[15] he does not fail to make the necessary qualification in the case of destruction resulting from the act of God. Thus he says:

"If the house fall down by tempest or be burnt by lightning or prostrated by enemies, or the like, *without a default of the tenant*",[16] etc. And again, "It is waste to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea the meadow or marsh is surrounded, * * but if it be surrounded suddenly by the rage or violence of the sea, occasioned by wind, tempest or the like, *without any default in the tenant*, this is no waste punishable."[17]

It is now possible to state the law of waste, as it has come to be in Littleton's time, in simple terms. *Tenants for life and for years are liable for waste, however occasioned, which results from their default, and not otherwise.*

But the argument still leaves something to be desired. What is this waste which the tenant is prohibited from making or suffering? When Coke says that "the tenant at his peril must keep the houses from wasting"[18] and that "he that suffereth a house to

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[13]Y. B. 44 Edw. III, 44; Fitz. Abr. Wast, 76.

[14]See cases cited page 436, *supra*, note 53.

[15]"This act (Stat. Marl. c. 24) prohibiteth that farmers (*firmarii*) shall not doe waste, and yet, if they suffer a stranger to doe waste, they shall be charged with it, for it is presumed in law that the farmer may withstand it." 2 Inst. 145. See more strongly to the same effect, *ibid.* 132, and the statement in Co. Lit. 53, a: "Burning a house by negligence or mischance is waste."

[16]Co. Lit. 53, a.

[17]*Ibid.* 53, b.

[18]Co. Lit. 53, a.

decay which he ought to repair doth waste,"[19] does he intend to lay down the principle that the tenant is under a duty to preserve the premises from ordinary wear and tear? The question of Coke's meaning is not free from doubt, but the law is plain. There is no authority for the view which has come to prevail in the profession and which has found unexpected support in a recent decision[20] that a tenant for life or years is responsible for the up-keep of the premises. He must do such acts, make such repairs, as are necessary to avert serious injury from the elements or from the acts of others—only this and nothing more. The cases of waste for non-repair, with which the books abound, are all grounded on the destruction or dilapidation resulting from the tenant's default. The principle of these decisions is well exemplified in a case of waste brought by Richard de Stapeldone against Robert Corun in the reign of Edw. III:[21] It was objected for defendant that by the inquest waste was not found but only want of roofing. But the court (*per* Hillary, *J.*) said that the finding was that for want of roofing the houses were wasted and destroyed, and the reporter adds: "And by some the point was touched that defect in roofing, even though the timbers remained standing, should be adjudged waste." But the point was not in the case and the suggestion remains a professional query and nothing more.[22] Confirmatory of this view is the well-established rule that it is no waste to leave the land unmanured and uncultivated or even to suffer it to grow full of thorns and brambles,[23] as well as the doctrine that it is the dispersion of villeins by maltreatment and not the imposition of new and unusual burdens that constitutes the waste.[24] The evidence for the proposition that the tenant is responsible only for waste and destruction resulting from his failure to repair is, indeed, mainly negative, but this qualification of his liability is so clear from the reported cases that it is only necessary to refer to them here.[25]

Thus restricted and defined, we are able to trace the law of permissive waste for another century and a half after Littleton,

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[19] 2 Inst. 145.

[20] Davies *v.* Davies (1888) 38 Ch. D. 499; see pages 632 (n. 44), 634, 635, *infra.*

[21] Y. B. (Rolls Series) 18 Edw. III, 40.

[22] Viner erroneously states this expression of opinion as the judgment of the court; Abr., Waste, D, 16.

[23] Y. B. 2 Hen. VI, 10; 3. c. Fitz. Abr. Wast, 33.

[24] Y. B. 2 Hen. VI, 11 (cited, Viner's Abr., Waste, D, 4).

[25] The later authorities are collated by Bewes, The Law of Waste (1804). 211-215. See also statement of Bramwell, *arguendo*, in Harnett *v.* Maitland (1847) 16 M. & W. 258, 259, that mere non-repair is not equivalent to permissive waste.

when suddenly we come upon an inscrutable fact. Permissive waste disappears root and branch from the records. We may, indeed, assume that where the tenancy was created by lease, lessors generally provided against permissive waste by covenant and doubtless the gradual extension of the action on the case to waste committed by a tenant hastened the process whereby the older remedy became obsolete. But these conditions afford no help in explaining the fact that lessors ceased to rely on the writ of waste or the courts to enforce it. Perhaps if we regard the substitution of the milder remedy afforded by the action on the case for the more drastic remedy provided by the statute as only a part of the general process whereby the principle of remuneration came to prevail over that of punishment in all cases of tort except those of an aggravated character, we shall come as near to an explanation of the fact as we are likely to get. Suffice it to say here that under the influence of the action on the case the law of waste entered on a new stage of development.

But the new remedy was to make its way slowly and with difficulty into the ancient field of waste and it came in at first through gaps in the hedge. The principle which obstructed its progress, familiar to all students of the action, is well expressed in a case toward the end of Elizabeth's reign:[26] "And a man shall never have an action on the case where he may have any other remedy by any writ founded in the Register; for this is only given where there wants such a remedy." Accordingly the action was first employed in cases lying outside the narrow limits of the writ of waste. It is familiar learning that the Statute of Gloucester was construed to apply only to him who had an immediate estate of inheritance and that it was, therefore, unavailable to protect tenant for life or years against his underlessee. By its terms, also, the statute extended only to tenant for life or years and not to tenant at will. Accordingly the first cases were of this kind. It may be questioned whether Brown, Serjeant, was not premature in arguing in *Potkin's Case*[27] that "an action *sur le cas* at common law lies against tenant at will"—trespass being available in such case.[28] But if the statement was not true at the time it was made, it was to become so.[29] But the other class of cases, where there was no remedy either in waste or trespass, are clearly within the

[26]Beswick *v.* Cunden (1596) Cro. Eliz. 520.
[27]Y. B. 14 Hen. VIII, 10: A case of voluntary waste.
[28]Lit. s. 71.
[29]Burchell *v.* Hornsby (1808) 1 Camp. 360.

purview of the action on the case. Thus in *Jeremy* v. *Lowgar*[30] the action was brought by one seised for life in right of his wife against a tenant for years for the destruction of the premises by fire and it was held that the action would lie.[31] The case is peculiarly interesting because of the clearness with which it brings out the fact that in abandoning the writ of waste and adopting the action on the case the law of waste has entered on a new phase. The influence exercised by forms of procedure in shaping and determining substantive rights is a commonplace of jurisprudence. No better illustration of it can be found than the instance before us. The new action starts with a clean slate. "What is waste and what not" must still "be determined by the common law," but the Statute of Gloucester is relegated to the dust heap of the law along with the remedy created by it. And so in *Jeremy* v. *Lowgar* the defense goes back to the common law before the statute and objects that the action lies not against a tenant by lease "in regard it was the plaintiff's folly to make a lease and not provide by covenant otherwise that the tenant should not commit waste." But the court held the contrary, by reason that the plaintiff, being himself only a tenant for life, was chargeable over. The fact that this case assumes a common law which never existed and that it deals with a situation for which the statute made no provision does not impair its value as an illustration of the change that has come over the law of waste.

But the change is still far from complete. A long time must yet elapse before the new remedy will be extended to cases for which the statute makes provision. The writ of waste is still to be found in the Register. As late as the year 1683—400 years after the institution of the action on the case—the Court of Common Pleas divided even on the question whether lessor, having the immediate estate of inheritance, could maintain the action against his tenant for years for voluntary waste—Pemberton, *C. J.*, and Levinz holding that the action would lie, Wyndham and Charlton, *contra*.[32] But the doubt was soon resolved in favor of the action and during the following century the cases are so

[30](1596) Cro. Eliz. 461.*

[31]See also Hicks *v.* Downling (1696) 1 Salk 13; Kinleyside *v.* Thornton (1776) 2 Bl. 1111.

[32]Jefferson *v.* Jefferson (1683) 3 Lev. 130: "And Pemberton held there was no peradventure but that he in reversion may waive his action of waste at this day and take his remedy by action upon the case against his lessee for years for waste done by him."

numerous that before its end Serjeant Williams is able to declare that "case has now become the usual action for * * * waste."[33]

We may well make the words omitted from the foregoing quotation from the learned serjeant the starting point of a new inquiry. Is it true, as he alleges, that case has become the usual action "as well for permissive as voluntary waste"? If it be not true, there is to-day no remedy for permissive waste by tenant for life or years except such as may be provided by covenant or condition in a lease. For the writ of waste has been abolished[34] and the Statute of Gloucester repealed[35] by act of parliament. The question, then, is whether the lessor, in losing the remedy provided by the statute, has lost all remedy for permissive waste except such as he may have stipulated for.

The question is not free from doubt on the authorities. The earlier cases seem clearly to sustain the action.[36] It is true that they are all cases in which the action is brought by tenant for life or years against a sub-lessee and that the right of the plaintiff to maintain the action is grounded on his liability over, but this only makes the cases the stronger as an assertion of a double liability for permissive waste—of the lessee to his lessor, of the sub-tenant to the lessee. In apparent antagonism to this line of adjudications is a group of cases decided in the first years of the last century[37] which have proved a stumbling-block to courts and writers alike. *Herne* v. *Bembow* may be taken as typical of the group. This was an action on the case against a lessee for waste in permitting certain buildings in his occupation to become ruinous, prostrate and in decay for want of needful reparations. It was, therefore, a characteristic case of permissive waste. It was held that the action would not lie, the court saying:

"If this action could be maintained the lessor might declare in case for not occupying in an husbandlike manner, which cannot be. The facts alleged are permissive waste. An action on the case does not lie for permissive waste."

Commenting on this case in *Yellowly* v. *Gower*,[38] Baron Parke discredits it by saying that it is badly reported and then distinguishes it on the ground that "the court seems to have contemplated the case only of a tenant at will," and adds:

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[33](1799) 2 Wms. Saund. 252, c: note to Greene *v.* Cole.

[34](1833) 3 & 4 Wm. IV, c. 27, § 36.

[35](1879) 42 & 43 Vict. c. 59.

[36]Jeremy *v.* Lowgar (1596) Cro. Eliz. 461*; Cudlip *v.* Rundall (1690) 4 Mod. 9; Hicks *v.* Downling (1696) 1 Salk. 13.

[37]Gibson *v.* Wells (1805) 1 New Rep. 290; Herne *v.* Bembow (1813) 4 Taunt. 764; Jones *v.* Hill (1817) Taunt. 392.

[38](1855) 11 Exch. 274.

"We conceive that there is no doubt of the liability of tenants for terms of years, for they are already put on the same footing as tenants for life, both as to voluntary and permissive waste, by Lord Coke, 1 Inst. 53."

A learned American judge[39] disposes of the case summarily as follows:

"In *Herne* v. *Bembow* it does not clearly appear that the lease was for a term. It is certain that the opinion of the court proceeded upon the principles applicable to tenants at will. As the case is reported in Taunton it appears to have been decided without argument or consideration. The opinion is a *per curiam* opinion, and the only case cited is *The Countess of Shewsbury's Case*, 5 Co. 14, which was a case of a tenancy at will."

On the other hand, in the case of *Powys* v. *Blagrave*,[40] Lord Cranworth, in refusing an application to compel a tenant for life to keep premises in repair, says (citing *Herne* v. *Bembow*): "But even legal liability is now doubtful;" and this doubt is echoed by the latest editors of Williams' Saunders, who, referring to the three cases under consideration, say: "Some recent decisions have made it doubtful whether an action on the case for permissive waste can be maintained against any tenant for years."[41] When it is added that *Yellowly* v. *Gower*[42] is taken by high authority to have overruled the three doubtful cases,[43] that the Chancery Division in a recent case[44] expressly repudiates their authority and that the same high tribunal, in a case decided a year later,[45] relies upon them as "positive decisions" which have only a few unconsidered *dicta* opposed to them, the confusion into which the judicial mind has fallen on the subject of the liability of tenants for life or years for permissive waste becomes apparent. The writer ventures to submit that, with one exception, all of these expressions of opinion on the three cases in question, whether favorable or unfavorable, are based on a misapprehension of the point decided in them, and that this misapprehension results from a failure to realize the transformation which, under the influence of the action on the case, the law of permissive waste has undergone.

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[39]Judge Depue of the Supreme Court of New Jersey in Moore *v.* Townshend (1869) 4 Vroom, 284.

[40](1854) 4 De G. M. & G. 448.

[41]2 Wms. Saund. (Ed. of 1871) 646.

[42](1855) 11 Exch. 274.

[43]Mr. Justice Williams, in his notes on Greene *v.* Cole, 2 Wms. Saunders, *supra*, declaring that *Y.* v. *G.* has stifled any doubt arising from the three cases in the Common Pleas; quoted with approval in Woodfall, Landlord and Tenant (18th Ed.), 700.

[44]Davies *v.* Davies (1888) 38 Ch. D. 499.

[45]*In re* Cartwright (1889) 41 Ch. D. 532.

The difficulty appears to be that during the last half century judges and law writers alike have approached the subject from the point of view of *waste* instead of that of *the action on the case*. The difference is fundamental and of far-reaching importance. It has been obscured of late by the abolition of forms of action and by the modern tendency to think in terms of substantive rights and obligations. We are beginning to forget that the lawyer of the early part of the last century still thought in terms of procedure; that for him as well as for the judge on the bench the forms of action were categories of legal thought. Whether *Herne* v. *Bembow* was or was not decided "without argument or consideration," we shall never know. But the question is immaterial. The case required very little of either. What the court had in mind was not waste but the action on the case, and it applied the principles of that form of action to the case of a tenant accused of waste just as it was daily applying them to other cases of alleged breach of duty. And it laid down no novel principle, but one that was doubtless received with approval, certainly without surprise, by the bar, namely, that case will not lie for bare non-feasance; or, shall we avoid controversy and say, for such non-feasance as had not previously been recognized as coming within the scope of the action? That this is a correct interpretation of the three decisions which have aroused so much criticism appears clearly from the fact that they were argued at the bar and on the bench from the "case" point of view, and from the further fact that they were all cases of non-repair without any element of "negligence." This is the circumstance that distinguishes them from the earlier cases[46] in which the action on the case was allowed against tenants guilty of permissive waste—in all of which the liability of the tenant was placed on the ground of his negligent handling of fire. This is not the place to make the inquiry which the circumstances invite into the scope of the action on the case or to discriminate between the several kinds and degrees of non-feasance with reference to that action. But we are certainly on safe ground in recognizing the distinction, from the point of view of the law of tort, between the permissive waste which, by careless dealing with fire, results in the destruction of the premises and that which, through mere inaction, permits the premises to deteriorate under the silent influence of time. The assumption[47] that the demise in *Herne* v.

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[46] Cited, page 630, *supra*.

[47] Parke, B., in Yellowly v. Gower (1855) 11 Exch. 274, 293; Depue, J., in Moore v. Townshend (1869) 4 Vroom 284, 287; see page 632, *supra*.

Bembow was to hold at will and that the case involves nothing more than a reaffirmation of the principle laid down in *The Countess of Shrewsbury's Case*[48] has nothing in its favor but the assumed necessity of explaining away the case. But this necessity disappears when it is realized that the case decides nothing as to the liability of tenants for permissive waste—the writ of waste is still available to him who seeks it in the Chancery[49]—but only that the action on the case may not be employed to enforce a liability of that sort.

The question remains—to what extent, if at all, have the more recent cases, which have been variously cited above, altered or modified the law of permissive waste as thus established? It would be easy to evade the question by arguing that the two cases, *Yellowly* v. *Gower*[50] and *Davies* v. *Davies*[51], decide nothing as to the remedy for such waste but are only concerned with the definition of what constitutes waste, and that for us, as for Lord Coke, it is still necessary to go back to the common law for this purpose. But the argument is specious and unsound. In the two cases under consideration the question was whether a clause in a lease exempting the tenant from the necessity of making certain repairs was in violation of a proviso governing the power under which the lease was executed. The proviso was to the effect that no lease made in the exercise of the power should render the lessee dispunishable of waste. It was held in both cases that the clause of exemption was in violation of the proviso, the term waste, as used in the proviso, including permissive waste and involving, therefore, the obligation to make the repairs excepted from the lease. But the courts, in deciding these cases, were not engaged in an academic exercise. The only kind of waste that concerned them was actionable waste, and in deciding that the term "waste" as employed in the proviso comprehended permissive waste they must be taken to have decided that such waste was punishable by some process at law or in equity. But as equity will not restrain permissive waste, and as the old writ of waste has been abolished, the decisions in question could have reference only to the action on the case and must, therefore, be taken to have given that action

[48](1600) 5 Co. 13; holding that case will not lie against tenant at will for negligent waste.

[49]But this action (waste) is now very seldom brought, etc.," *per* Williams, Serj., *circa* 1798, in 2 Wms. Saund. 252. The action on the writ was abolished in 1833 (3 & 4 W. IV, c. 27, § 36).

[50](1855) 11 Exch. 274.

[51](1888) 38 Ch. D. 499.

substantially the same scope in permissive waste as that of the older remedy which it has gradually superseded. The fact that *Davies* v. *Davies* went beyond the old law in holding tenant for years liable for ordinary wear and tear is, perhaps, to be regretted but does not impair its value as an assertion of the general liability of such a tenant for permissive waste, even in cases where no active negligence is imputed to him.

For the case *In re Cartwright*[52] little can be said on the score of authority.[53] In so far as it is based on the assumption that at common law a tenant for life is not liable to a remainderman for permitting the buildings on the land to fall into a state of dilapidation, it is clearly wrong. The records of the law give abundant answer to the question addressed to counsel by Mr. Justice Kay: "Can you show me a case in which a court of common law has given damages in such an action?" The final determination of the case on the grounds of public policy urged by the learned justice we may safely leave to our brethren of the English bench and bar.

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[52](1889) 41 Ch. D. 532.
[53]Cf. *in re* Freeman [1898] 1 Ch. 28; and see 5 L. Q. R. 448.

COMMUTATION TICKETS AND RATE REGULATION.

The "rate-making" power of the Interstate Commerce Commission is set forth in the Hepburn Bill in rather sweeping terms. The Commission is authorized whenever, after full hearing, it shall be of the opinion that *"any of the rates or charges whatsoever,"* demanded by any common carrier subject to the Act to Regulate Commerce for the transportation of persons or property, are unjust or unreasonable, "to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged." Comprehensive as the language of the statute is, there are certain limitations upon the rate-fixing powers of the Commission which were possibly not anticipated by some of the proponents of the law, and which have doubtless escaped the observation of some lawyers who are otherwise well informed upon the general subject of Rate Regulation.

A very practical example of such limitation is illustrated in the case of the ordinary monthly and quarterly tickets used the country over by the rapidly increasing armies of commuters. These tickets are sold by the railway companies at greatly reduced rates —sometimes less than one-half cent per mile—and their sale by the carriers is permitted under Section twenty-two of the Interstate Commerce Act. To state that a carrier which has for many years sold a certain commutation ticket at a reduced rate to induce persons to make their homes in suburban sections to which the rate applies, may suddenly, arbitrarily, and for the mere purpose of increasing revenues already ample to pay fixed charges, operating expenses and dividends, increase such rate twenty-five or fifty per cent. or withdraw such commutation ticket altogether, may cause some feeling of uneasiness in growing suburban localities. To add that in many such cases, even under the broad powers conferred by the Hepburn Amendments, the Interstate Commerce Commission could probably afford no very practical relief, would doubtless result in a very careful scrutiny of authorities. Nevertheless there seems reason to believe that both propositions may be successfully established.

Nor are we supposing a course of action which no railway management would likely pursue. On the contrary, what appears to be just such a course as that suggested has recently been fol-

lowed by a company which operates a line extending from Pennsylvania to the various settlements in Southern New Jersey.[1] For many years this company has sold various forms of commutation tickets covering the points on its line, and the favorable rates thus offered have been one of the inducements to suburban residence in South Jersey. On the first of June, 1908, the company put into effect a schedule of advanced fares, which in one instance increased the price of the monthly ticket over twenty-six per cent., the quarterly ticket sixty-three per cent., the monthly school ticket about forty-six per cent. In another case the price of the quarterly ticket was advanced thirty-eight per cent., and that of the school ticket over thirty-three per cent.

The company offered certain reasons in justification of its course, some of which unquestionably merit consideration, but it seems from an application of the usual tests that under the old rates the road had done very well financially, and would doubtless have so continued but for the depression marked by the recent panic. Its expenditures for maintenance had been liberal, it had paid fixed charges and operating expenses, and an unbroken series of five and six per cent. dividends upon its stock. In addition it had earned each year a considerable surplus, which should at least in part be translated into dividends in determining whether or not the road earned under the old rate that reasonable return upon the value of the property devoted to public use to which it is properly entitled.[2] As for the fact that during the recent panic and its succeeding recession the revenues of the road were materially reduced, that in itself would not necessarily warrant an advance in rates or fares.[3]

In view of the foregoing it would seem that the long-established rates and fares on such a road should not have been advanced without a substantial justification by the carrier. Such has been the repeated holding of the Commission and the Courts.[4] But

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[1]West Jersey & Seashore Railroad.

[2]Illinois Cent. R. R. *v.* Inter. Com. Comm. (1907) 206 U. S. 441; Cattle Raisers' Ass'n *v.* M. K. & T. R. R. (1908) 13 I. C. C. Rep. 418, at 432; Smyth *v.* Ames (1898) 169 U. S. 466. But see Cotting *v.* Kansas City Stock Yards Co. (1901) 183 U. S. 79.

[3]*Re* Proposed Advance in Frt. Rates (1903) 9 I. C. C. Rep. 382; Rates from St. Louis, etc. (1905) 11 I. C. C. Rep. 238; Steenerson *v.* Gt. N. Ry. (1897) 69 Minn. 353.

[4]Coxe Bros. *v.* Lehigh Valley R. R. (1891) 4 I. C. C. Rep. 535; Holmes *v.* Southern R. R. (1900) 8 I. C. C. Rep. 561; Warren Mfg. Co. *v.* Southern R. R. (1907) 12 I. C. C. Rep. 381; Cotting *v.* Kansas City Stock Yards Co., *supra*, at 97-8; I. C. C. *v.* C. Gt. W. R. R. (U. S. Sup. Ct. March 23, 1908). See also Banner Milling Co. *v.* N. Y. C. R. R. (1908) 14 I. C. C. Rep. 398.

suppose a resident of South Jersey, deeming himself injured by the above-mentioned advance in commutation fares, should file a complaint with the Commission. Obviously the most practical remedy he could seek would be an order from the Commission fixing such fares at the old established rates. Could the Commission in the case stated make such an order? Probably not.

The answer is to be found in *Sprigg* v. *Baltimore & Ohio R. R. Co.*[5] This case was decided by the Commission about six years prior to the passage of the Hepburn Bill, at which time the Commission had no rate-making power.[6] The opinion (by Chairman Knapp) discusses generally the regulation of commutation fares and the power of Congress or its creature commission over such charges, and holds that ordinarily a carrier cannot be compelled to issue commutation tickets or to restore such tickets where they have been withdrawn. The specific holding of the Commission in the *Sprigg* Case does not in so many words include the question of an advance in fares, but the reasoning of the opinion leaves no doubt as to the limitations with which, in the opinion of the Commission, the Government's rate-making power is hedged about in the case of commutation tickets. To quote from the opinion:

"In whatever aspect the question is considered, the argument for complainants comes to this, that carriers can be compelled, under such circumstances as are disclosed in this case, to put in discriminating rates, provided they are not unduly discriminating. Because they are permitted to sell commutation tickets, therefore they can be forced to do so. At least, if they have sold such tickets for a considerable period they can be required to continue to sell them, although at a rate much below the sum justly charged to the general public.—There is no legal basis for such a contention. If we had full rate-making power, as ample and complete as that possessed by the Congress itself, we could not make such an order. We could in that case prescribe a rate which would be reasonable for everybody to pay, and in determining what that rate should be we could take into account the price at which commutation tickets had been sold, the length of time they were furnished, and all other facts bearing upon the reasonableness of a common public rate for the territory and travel in question; but we could not under any circumstances compel the granting of a special and lower rate for the benefit of a particular class."

This conclusion is fully supported by *Lake Shore & M. S. R. Co.* v. *Smith*,[7] decided by the Supreme Court of the United States

[5](1900) 8 I. C. C. Rep. 443.
[6]I. C. C. *v.* C. N. O. & T. P. Ry. Co. (1897) 167 U. S. 479.
[7](1899) 173 U. S. 684; 19 Sup. Ct. Rep. 565.

in April, 1899. In that case a statute of Michigan which sought to compel the sale of 1,000-mile tickets at lower rates than those fixed for ordinary passenger travel was held unconstitutional. The question decided by the court is stated to be:

"whether the legislature of a State, having power to fix maximum rates and charges for the transportation of persons and property by railroad companies, * * * and having power to alter, amend or repeal their charters, * * * has also the right, after having fixed a maximum rate for the transportation of passengers, to still further regulate their affairs, and to discriminate and make an exception in favor of certain persons, and give to them a right of transportation for a less sum than the general rate provided by law."

This question is answered in the negative, and the following extracts from the opinion will indicate the line of reasoning adopted:

"The act is not a general law upon the subject of rates, establishing maximum rates which the company can in no case violate. The legislature having established such maximum as a general law now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statutes regulating rates and charges, and, notwithstanding such rates, it assumes to provide for a discrimination, an exception in favor of those who may desire and are able to purchase tickets at what might be called wholesale rates,—a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule."

"The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community, and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof."

As already indicated, the *Sprigg* Case was decided before Congress had delegated any rate-fixing authority to the Commission. There was a vigorous dissenting opinion by Commissioner Clements, and it might have been assumed that the position the Commission would take in the event of the same subject coming before it subsequent to the passage of the Hepburn Amendments, was a question fairly open to doubt.

The subject, however, has in a slightly different form recently been presented for discussion and decision by the Commission in the case of *Field* v. *Southern Ry.*[8] and the ruling in the *Sprigg*

[8](1908) 13 I. C. C. Rep. 298.

Case distinctly approved. The following is quoted from the opinion, which is by Commissioner Harlan:

"The prayer of this petition is that the Commission shall enter an order requiring the defendants to re-establish the special party rates which in past years have generally been accorded by carriers to theatrical companies and other special organizations engaged in giving public exhibitions.

"It is clear that the Commission has no authority to enter such an order. While the act to regulate commerce as amended confers upon the Commission the power to reduce a passenger fare alleged to be excessive, when a complaint to that effect has been filed and the issue thus made has been supported by competent testimony, it has vested in the commission no affirmative power to require carriers to establish special fares, based upon less than the normal passenger-mile revenue, for the use of passengers on particular occasions, or for a special purpose. This was so held in *Cator* v. *Southern Pacific Co. et al.*,[9] and in *Sprigg* v. *Baltimore & Ohio R. R. Co. et al.*,[10] and the question is not to be regarded therefore as open to further discussion."

It would seem, then, that the ruling of the *Sprigg* Case is to stand, at least until the Commission's holding is modified or reversed.

Returning to the case of the commuter living along the line of the South Jersey road who finds that the price of the commutation ticket which he has been using for years has been suddenly advanced, say sixty-three per cent., and that the school tickets he has been buying for his children have been advanced forty-six per cent., it seems difficult to suggest how the Commission can make an order which will restore to him the old rates which were presumptively reasonable and which, let us assume, had been increased without good cause. If he filed his complaint, the Commission could look into the subject of passenger rates and make an order fixing a reasonable rate for all travellers. In fixing such rate it could take into account the old commutation rate, the time it had been in effect and all facts bearing upon the general question of the reasonableness of a rate to be paid by everybody; but it "could not under any circumstances compel the granting of a special and lower rate for the benefit of a particular class"—say for a class who travel every day.

In fact the Commission could do no more than to fix a single fare rate, open to everyone who took a given journey, whether

[9](1893) 6 I. C. C. Rep. 113.
[10](1900) 8 I. C. C. Rep. 443.

he travelled once a year or twice a day; whether he journeyed alone or with a party of fifty. In a word, the Commission would seem to deny the power of the government to fix a rate upon the "wholesale" principle if the proposed "wholesale" rate differed from the "common public rate" for "everybody to pay."

This "wholesale" principle has been more or less discussed in connection with the question of the regulation of railway rates. The subject has not yet been satisfactorily worked out in all phases, but there are decisions by the Courts and the Interstate Commerce Commission and discussions by text-writers which may be profitably examined.

With respect to freight rates it seems to be established that a difference in rates based merely upon quantity is unlawful. That is to say, there may be no strictly "wholesale" freight rates. In *Burlington, C. R. & N. Ry. Co.* v. *Northwestern Fuel Co.*,[11] the Court (Mr. Justice Brewer) said in speaking of a contract which favored a shipper simply because of the large amount of freight transported:

"That such a discrimination is against public policy, and not to be sustained, I am very clear. On the face of it, it is a discrimination based not upon the cost of transportation, upon the time and labor and annoyance which may result to the railroad company, but solely upon the amount of transportation."

A similar ruling was made (Thayer, Judge) in *United States* v. *Tozer*.[12]

In the case of *Providence Coal Co.* v. *Prov. & Worcester R. R. Co.*,[13] the Commission (*per* Chairman Cooley) condemned the offering by the railway company of a ten per cent. discount from its regular rates to any company receiving shipments of coal amounting to thirty thousand tons or more *per* year. Judge Noyes in discussing the subject of discrimination says,[14] "The general principle of an allowance for quantity—*a preferential rate for large shippers*—is indefensible." And in the very recent decision by the Commission in *Cal. Commercial Ass'n* v. *Wells, Fargo & Co.*,[15] in which the Commission quotes the above expression from Judge Noyes' work, the following language is used by Commissioner Lane, who wrote the majority opinion:[16]

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[11](1887) 31 Fed. 652.

[12](1889) 39 Fed. 369.

[13](1887) 1 I. C. C. Rep. 107.

[14]American Railroad Rates, page 103. The italics are the present writer's.

[15](1908) 14 I. C. C. Rep. 422.

[16]Commissioners Knapp and Harlan dissented from the general proposition sustained by the majority, which was to the effect that a forwarder may "bulk" shipments of various consignors and ship at car-load rates.

"It appears thus to be universally recognized that the only discrimination which can legally be made between a large shipment and a small one must be based upon the difference in the cost of service."

"Difference in the cost of service" then does seem to warrant the carrier's charging different rates for carrying the same commodity. As stated by Judson in his excellent treatise on "Interstate Commerce:

"While discrimination based merely on the quantity shipped is not justified, discrimination is proper when it is based on difference in the cost of handling." [17]

It is by application of this principle of difference of cost of handling that the carriers are able to justify charging considerably lower rates on car-load than on less than car-load lots. In *Scofield* v. *L. S. & M. S.*[18] the Commission said:

"Reasons that are substantial exist for making the rate lower *per* barrel in car-load lots than in less than car-load quantities. The cost of service is very considerably less in the case of shipments in car-load lots than in less than car-load quantities. We have had occasion to pass upon this frequently, but the evidence here requires us to do so again. The shipment by the car-load goes direct to destination. It is loaded by the shipper and is unloaded by the consignee. The freight in it does not stop at the way stations to be handled in parcels to different consignees along the line. Only one bill of lading is made. It requires but one entry upon the way-bill. The time occupied in transporting it to destination is far less than in the case of a shipment in less than car-load quantities. There is but one collection of charges for freight.

"Where the shipment is made in less than car-load quantities a separate receipt or bill of lading has to be given to every shipper for his parcel. A separate entry of every item has to be made on the way-bill. The shipment is by a local freight train which stops at every station for which there is a package of freight. The freight has to be taken out in parcels and delivered at each of these stations. The freight is loaded and unloaded by the railroad company. There are as many collections of charges for freight as there are different parcels. The time occupied in transporting it is usually from two to three times as long as in the case of a car-load shipment—according to distance. It occupies a whole car, and for the vacant space in that car the company is receiving no compensation." [19]

From the point of view of a practical shipper, however, a preferential car-load rate looks very much like what he would term a

[17] Page 195.

[18] (1888) 2 I. C. C. Rep. 90.

[19] See also Beale & Wyman, "Railroad Rate Regulation," Chap. XXIII; Harvard Co. *v.* The Penn. Co. et al. (1890) 4 I. C. C. Rep. 212.

"wholesale" rate; and he knows that such rates are and for a long time have been made by the carriers, and that they are open only to a special class in the community, namely, those who are willing and able to ship a car-load at a time.

This last statement is to be modified to the extent made necessary by the recently announced decision of the Commission in the case of *Export Shipping Co.* v. *Wabash R. R.*,[20] and that of *Cal. Commercial Ass'n* v. *Wells, Fargo & Co.*[21] which hold that a number of shipments from various merchants may be "bulked" by a forwarder and shipped to an individual distributing consignee at the car-load rate regardless of the question of ownership. In the head note to the *Wells, Fargo* Case it is stated that:

"The *cost* of carrying a 'bulked shipment' is not greater than the *cost* of carrying the same amount of freight at the instance of an individual owner. The charges must therefore be the same in each case."

It is still true, nevertheless, that the car-load rate is available only to the shipper who can offer a car-load of freight at a time, or who is so circumstanced that he can employ a forwarder who is able to induce other shippers of the same commodity from the same point of origin to bulk their freight with his and make up a car-load lot. It is equally true that notwithstanding the logic employed by the Commission in the *Sprigg* Case, to the effect that neither they nor Congress itself could fix a passenger rate available only to those who are willing and able to pay for a monthly commutation ticket, for example, yet the same Commission finds no difficulty in fixing "car-load" freight rates. They are to-day making such rates right along[22] and it seems difficult to distinguish their action in principle from the making of a commutation passenger rate.

Justification for the lower rate is the same in each case and depends upon decreased cost of the service. The cost of service in carrying commuters can easily be shown to be less than that in the case of "one-way" passengers. The commuter is given one ticket for say sixty rides; the single trip travellers require sixty tickets for the same service. The cost of printing and labor required to make and sell one commutation ticket is probably little more than one sixtieth of that required in the case of the

[20] (1908) 14 I. C. C. Rep. 437.

[21] *Supra.*

[22] National Petroleum Ass'n *v.* C. M. & St. P. R. R. (1908) 14 I. C. C. Rep. 287; Greater Des Moines Comm. *v.* C. G. W. R. R. Co. (1908) 14 I. C. C. Rep. 294.

sixty single tickets, and auditing and accounting expenses connected with handling commutation and single fare tickets respectively stand on a similar basis of comparison. Moreover, the commuter requires less assistance and directing than the stranger on the road, and in the ordinary case does not have the usual trunks and baggage which the railroad carries free of charge for the traveller who journeys but seldom. The commuter pays for his sixty rides in advance and the company has the use of the money. The "one-way" travellers pay for their sixty rides one at a time and retain for themselves the use of the money represented by the other fifty-nine rides. Altogether the differences in cost of service seem to be just as marked in the case of commuters as compared with "one-way" travellers, as they are in the case of car-load consignments of freight as compared with less than car-load lots. Now the Commission does fix car-load freight rates. It does not, and holds that neither itself nor Congress can, fix commutation fares at a rate below the sum justly charged to the general public; in other words, at a rate less than the one-way single fare.

This apparent inconsistency seems to be more marked when it is considered that there has been no such interdiction by the Courts and text-writers against the application of the "wholesale" principle to passenger rates as there has been in the case of freight rates. In the *Party Rate* Case[23] the Supreme Court used the following language:[24]

"It (The Interstate Commerce Act) was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road. In other words, it was not intended to ignore the *principle that one can sell at wholesale cheaper than at retail.*[25] It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable. * * * In short, it was an established principle of the business that whenever the amount of travel more than made up to the carrier for the reduction of the charge *per capita,* then such reduction was reasonable and just in the interests both of the carrier and of the public."

In the same case the Court, after pointing out the evil effect of granting to certain shippers a preferential freight rate, said:[26]

[23]Interstate Com. Comm. *v.* B. & O. Railroad (1892) 145 U. S. 263.
[24]At page 276.
[25]The italics are the writer's.
[26]At page 280.

"The same result, however, does not follow from the sale of tickets for a number of persons at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is enabled at a particular instance to travel at a less rate than he." [27]

It seems difficult to suggest under the present decisions how a complete and practical regulation of existing passenger fares by Commission is to be worked out. Possibly the rulings herein discussed may, if they prevail, make for flat rates *per* mile for all passenger transportation. Such rates are not without advocates, who hope that some day there will be established a "zone" system of fares, under which a traveller may ride as long and as far as he likes within a given zone for one fare. Such a system of charges is of course already in effect in street car transportation and the extension of its use may not be an improbability. In any event, it is not likely that a generation which has compelled a serious attempt at the practical regulation of railway rates by government will be satisfied with any plan which is not complete and comprehensive.

BORDEN D. WHITING.

NEWARK, N. J.

[27] See also Judson on Interstate Commerce, § 154.

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NOTES.

RECENT ABERRATIONS IN THE LAW OF CONTINGENT REMAINDERS AT COMMON LAW.—The common law rule that no limitation capable of taking effect in any way as a contingent remainder may be construed as an executory devise, for several centuries invariably applied irrespective of intention, like the rule in Shelley's case, *Carwardine* v. *Carwardine* (1857) 1 Eden 34, has now been reaffirmed in England, *White* v. *Summers* (Ch. Div. 1908) 98 L. T. 845, in spite of the grave doubt cast upon it by recent cases. Earlier it had been applied in cases of limitations to a class, *Doe d. Herbert* v. *Selby* (1824) 2 B. & C. 926; *Festing* v. *Allen* (1843) 12 M. & W. 279, even when to children reaching a certain age "before or after" the death of the life tenant. *Brackenbury* v. *Gibbons* (1876) L. R. 2 Ch. Div. 417. The apparent attack upon the rule originated through class limitations containing the words "before or after." In *Lechmere* v. *Lloyd* (1881) L. R. 18 Ch. Div. 524, these words were construed to create a remainder for children reaching 21 years in time to take as remaindermen, but an executory devise for those who could not take in the first class. The court seemed erroneously to construe the limitation in the light of events as they existed at the time of the life tenant's death; and overlooked the fact that the rule should be

applied if the event *could* have occurred either before or at the termination of the life estate, as well as afterwards. 2 Fearne Cont. Rem. (4th Ed.) 17. The authority of the rule was recognized, but its applicability denied on the ground that there were two distinct classes, one of which could participate only if the gift to them were construed as executory. *Lechmere* v. *Lloyd, supra,* was followed in *Miles* v. *Jarvis,* (1883) L. R. 24 Ch. Div. 633, and in *Dean* v. *Dean,* L. R. [1891] 3 Ch. 150, construing words practically identical. *Blackman* v. *Fysh,* L. R. [1892] 3 Ch. 209, cited as in accord is distinguishable. While the lower court regarded the gift as executory on the authority of the above cases, its decision was sustained on appeal on the perfectly proper ground that the interest was, on a certain event, to take effect by way of interruption.

It is admitted in *Dean* v. *Dean, supra,* that the mere form of the words used does not express a different intention from those in the ordinary case. If these cases stand for the proposition that an emphatic expression of intention will defeat the rule, while a less forcible one will not, the result is to make a rule of law one of construction. But it is contended that, as in the ordinary case, *Festing* v. *Allen, supra,* the class is divided on the life tenant's death into two parts, the members of one of which take remainders, while those of the other do not take at all, the addition of the words "before or after" is an express executory gift to those who cannot take as remaindermen. *Dean* v. *Dean, supra.* Now the event which determines into which class a devisee falls is the death of the life tenant. Those who are thus determined to be remaindermen appear to be entitled to possession, and the interest of the others must then take effect by way of defeasance, as true executory devises. When the first executory devisee becomes of age, his proportionate share of the property will be taken from those in possession, and when another of them fulfills the condition, his share defeats a part of the estate of each one who has come in ahead of him. But the court in *Lechmere* v. *Lloyd, supra,* had no such complicated process in mind. The interests of the remaindermen, who apparently had possession, were merely "liable to open up to let in the two infant children on their fulfilling the conditions of the will." It is submitted that such cannot be the case. Allowing one class to open up to let in members of another, or interests in possession to open up to let in other interests in possession accruing at a later time, are quite different matters from the opening of a class of remaindermen to let in others of the same class. Under this two-class view, a curious result would follow a conveyance by the life tenant with the effect of a fine. Contingent remaindermen who attain 21 before or at the death of the life tenant would be barred, while the others would not, though all were in exactly the same position when the fine was levied, and the testator showed no intention of giving destructible interests to some children and indestructible ones to others.

Alternative gifts by way of remainder and of executory devise are possible. *Doe d. Evers* v. *Challis* (1859) 7 H. L. C. 531. Such would be a gift to all the children, if they all attain 21 before the death of the life tenant, but if none of them do, then to them when they do attain 21, or in case any of them do not, to all when the last attains 21. But the view of the court in *Lechmere* v. *Lloyd, supra,* is not that the children take as one class, but as two classes. If these words can be so construed, any words

indicating an intention that all the children should take, should logically be construed in the same way. The result would be the practical abrogation of the common-law rule as regards class limitations. Fortunately, however, the above cases have been limited to their facts. *Symes* v. *Symes*, L. R. [1896] 1 Ch. 272.

A more startling departure from the old rule is the case of *Battie-Wrightson* v. *Thomas*, L. R. [1904] 2 Ch. 95; cf. 5 COLUMBIA LAW REVIEW 167. A testator by codicil directed that no devisee under his will should have a vested interest until the attainment of the age of 24 years. This was held to create executory interests, because the limitations were not intended necessarily to take effect on the termination of the prior estate. The case can only be upheld by viewing intention as capable of overriding the common-law rule. It may well be argued that the result of the Contingent Remainder Acts are here attained without legislation. Prof. Kales, 21 Law Quar. Rev. 118. A recent case, however, *White* v. *Summers, supra*, limits this case also to its facts. The limitation in the principal case was to the first son who "shall attain, or have attained 21 years," words far more emphatic than those of the preceding case, and apparently the same in meaning as those in *Lechmere* v. *Lloyd, supra*. *Battie-Wrightson* v. *Thomas, supra*, is distinguished, though unjustifiably, on the ground that alternative limitations were created. Intention, which seems to be the fundamental basis of all the other cases, is entirely discredited by the court as a test for the applicability of the rule. This, it is submitted, is the sound view at common law. If legislation was necessary in the beginning to save contingent remainders, it is not for the courts to extend it to wills specifically excepted by the statute.

ADMIRALTY JURISDICTION AND THE BRINGING IN OF THIRD PARTIES.—The difficulties experienced by the Supreme Court in admiralty causes are attributable to the indefiniteness of the clause, "the judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction." The practice of the English courts at the time of the adoption of the Constitution was early disregarded as a test, *The Vengeance* (1796) 3 Dall. 297, and the jurisdiction exercised by the Colonial and State courts prior to the Constitution declared determinative. *Waring* v. *Clark* (1847) 5 How. 441. Yet, apparently, by the use of both terms "admiralty" and "maritime," the broadest possible grant of jurisdiction was intended. Benedict, Adm. § 188. The words are not synonymous, *The Sandwich* (1806) 1 Pet. Adm. 233n, 234, maritime cases meaning such as are so considered by the maritime law of nations. Benedict, Adm. 40, 41; and see *The Seneca* (1824) Fed. Cases 12670; *De Lovio* v. *Boit* (1815) 2 Gall. 398, 472; *Hale* v. *Ins. Co.* (1842) 2 Story 176, 183. As to jurisdiction, it is submitted that the Supreme Court has practically accepted the general maritime law as a guide. Benedict, Adm. § 162. The adoption of the "nature of the contract" test for contracts, *Ins. Co.* v. *Dunham* (1870) 11 Wall. 1, and the extension of the locality test to include injuries by a vessel to an aid to navigation firmly affixed to the land, point to this conclusion. *The Blackheath* (1904) 195 U. S. 361. Some of the hampering decisions of early judges influenced by the English view of jurisdiction, *The General Smith* (1819) 4 Wheat. 438; cf. *The*

Canal Boat Kate Tremaine (1871) 5 Bene. 60; *Ferry Co.* v. *Beers* (1857) 20 How. 393; cf. *Consulat de la Mer,* Ch. 32, have been sustained on the doctrine of *stare decisis, The Lottawanna* (1874) 21 Wall. 558, yet many have been wisely overruled. *The Eagle* (1868) 8 Wall. 15.

After jurisdiction has been acquired, the consistent application of the principles of the maritime law has been hindered by the common law training of judges sitting in admiralty. For example, the common law doctrine of principal and agent was responsible for the rule that a boat under tow is not liable for a tort if it had no control over the towing vessel. *Sturgis* v. *Boyer* (1860) 24 How. 101; cf. *The Doris Eckhoff* (1887) 32 Fed. 555; *The China* (1868) 7 Wall. 63, 68. The common law of express contracts caused the refusal to view unenforcible exorbitant contracts of salvage. *The Elfrida* (1898) 172 U. S. 186. There is, however, a tendency to look to the maritime law. For example, a municipal corporation acting as an agent of the State is liable for the negligence of its agents. *Workman* v. *New York* (1900) 179 U. S. 552. In *The Harrisburg* (1886) 119 U. S. 199, the Supreme Court clearly intimated that if a cause of action for death by wrongful act were given by the maritime law, it would be granted by the federal courts. For other instances in which the maritime law has been considered authoritative, see *The J. E. Rumbell* (1893) 148 U. S. 1; *The Max Morris* (1890) 137 U. S. 1; *Mutual Safety Ins. Co.* v. *Cargo of The George* (1845) Fed. Cas. 9981.

In a recent case, *Evans* v. *New York, etc., S. S. Co.* (1908) 163 Fed. 405, a libellant had an action in admiralty against a steamship company which in turn had an action at common law only against a warehouseman. Asserting that the warehouseman might be petitioned in under Supreme Court Rule 59, because of his liability over, and viewing it as immaterial that such liability was not maritime, the court allowed his joinder as respondent. In all previous applications of this Rule, except in *Salisbury* v. *70,000 Feet of Lumber* (1895) 68 Fed. 916, there was a maritime cause of action against the third party. *The City of Lincoln* (1885) 25 Fed. 835; *The Alert* (1889) 40 Fed. 836. Under the Colonial or English practice there is no precedent for the principal case. Roscoe, Adm. Prac. (3rd Ed.) 321. It has been said that admiralty will give incidental relief though it passes upon a claim over which it could not have taken original jurisdiction, Benedict, Adm. 17; *The Epsilon* (1873) 6 Bene. 378; but see *ex parte Phenix Ins. Co.* (1886) 118 U. S. 610, but the authorities relied upon support no such proposition. When a tort cognizable in admiralty is consummated partly on land and partly on water, compensation is given for injuries sustained on land. *Am. Ins. Co.* v. *Johnson* (1827) 1 Blatch. & H. 9. There is, however, but one cause of action, which is maritime, and such compensation is given by way of damages only. Moreover if a contract for services is divisible, admiralty enforces only that part which is maritime. *The Pacific S. S. Co.* v. *Ferguson* (1896) 76 Fed. 893; *The Richard Winslow* (1896) 71 Fed. 426. When mortgagees and other lien holders proceed against funds in court, admiralty is determining the owner and in no sense permitting the prosecution of an action over which it has no jurisdiction. *The Lottawanna* (1873) 20 Wall. 201. The general maritime law must be examined for precedent, not only because that law should be deemed authoritative, but also because Rule 59, having its origin in that law, *The*

Hudson (1883) 15 Fed. 162, should be interpreted in its light. The law of continental Europe, claiming jurisdiction only over causes relating to the sea, Zouch, Adm. 24-38, gives no support to the principal case. Where third parties are proceeded against the cause has always been such as is originally cognizable by a maritime court. *Navire "Gyptis"* (1887) 2 *Revue Inter. du Droit Mar.* 664.

It is not improbable, however, that the higher courts, influenced by equitable procedure, where third parties are frequently brought in, though originally not liable in equity, may affirm the decision. It is sometimes said that admiralty acts as a court of equity. This statement, however, is untrue, for an admiralty court has none of the essential characteristics of an equity court. *The Phoebus* (1837) 11 Pet. 175; *Grant* v. *Poillon* (1857) 20 How. 162. Even where jurisdiction is obtained, admiralty refuses to pass upon questions peculiarly within the Chancellor's jurisdiction, e. g., the reformation of a contract. *Myer* v. *Pac. Mail S. S. Co.* (1893) 58 Fed. 922. Admiralty recognizes principles similar to those of equity, e. g., the doctrine of unclean hands. *Am. Ins. Co.* v. *Johnson, supra.* The refusal to enforce stale liens is analogous to the theory of laches. *The Nebraska* (1895) 69 Fed. 1009. These conceptions, however, are inherent in the maritime law and were not extracted from equity jurisprudence. Benedict, Adm. § 329. Though from the standpoint of avoiding circuity of action and of saving expense to the original respondent, who otherwise must bring a new suit on his common law claim, the rule of the principal case might seem desirable, such equitable considerations should not be invoked to effect an extension of jurisdiction unknown to the maritime law, to the courts of England or the Colonies.

Personal Communications Within Section 829 of the New York Code.—Section 829 of the New York Code of Civil Procedure provides for the disqualification of an interested party from testifying against an executor, etc., concerning a personal communication or transaction with the decedent. In defining a personal transaction or communication, the Court of Appeals has not been consistent. The tendency of the earlier cases was to restrict the terms; an interested witness could testify to a conversation between the decedent and a third party in which he participated, provided his testimony was restricted to what passed between the other two parties to the transaction. *Cary* v. *White* (1874) 59 N. Y. 336. Soon after, a witness was disqualified from testifying to a conversation in which he was included in the slightest manner by word or gesture. *Brague* v. *Lord* (1876) 67 N. Y. 495. Finally, any words uttered in the presence of a witness were held to be communications to him. *Matter of Eysamen* (1889) 113 N. Y. 62; *Matter of Dunham* (1890) 121 N. Y. 575; *Matter of Bernsee* (1894) 141 N. Y. 389. Yet recently, in the case of *Hutton* v. *Smith* (1903) 175 N. Y. 375, the Court of Appeals reverted to the test in *Brague* v. *Lord.* This test is uncertain, and objectionable because of the difficulty in determining, before cross-examination, what part the witness played. There would seem to be only two definitions of a personal communication which afford a definite test: (1) a communication directly with the decedent in which the witness took an active, and not a merely passive part;

(2) any impression received through the senses directly from the decedent, which the decedent, were he alive, could contradict or explain. This latter test, though apparently extreme, is more in accordance with the spirit of the statute as interpreted by the New York courts. True, they have not applied it consistently. Thus it has been held that a witness may testify to having seen the decedent at a particular place. *In re Brown* (1891) 14 N. Y. Supp. 122; and see *Hier* v. *Grant* (1872) 47 N. Y. 278. If this case stands, the fine distinction must be drawn between the mere fact of seeing the decedent, and positive impressions of the decedent's conduct, condition, or acts; for it is well established that a witness who, from sight or hearing, has derived definite impressions of the decedent's physical or mental condition, may not testify to such impressions, *Holcomb* v. *Holcomb* (1884) 95 N. Y. 316, and testimony as to acts done by the decedent, even in ignorance of the witness's presence, is no more admissible than testimony as to words spoken by him. *Matter of Eysamen, supra; Holland* v. *Holland* (N. Y. 1904) 98 App. Div. 366. The chief confusion is in regard to conversations between the decedent and a third party overheard by the witness. It is to be regretted that the holding of the *Eysamen* case was not regarded as conclusive.

The courts have also been troubled in determining the extent to which a witness may testify concerning extraneous facts tending to prove a personal transaction. Aside from evidence introduced in rebuttal of an opposing witness, where different rules apply, see *Pinney* v. *Orth* (1882) 88 N. Y. 447; *Clift* v. *Moses* (1889) 112 N. Y. 426, two tests have apparently been laid down. (1) If the fact creates the natural inference of a personal transaction it is inadmissible. *Nay* v. *Curley* (1889) 113 N. Y. 575. The inference need not be a logically necessary one. Thus, evidence of the possession of an instrument is inadmissible as raising the inference of delivery. *Richardson* v. *Emmett* (1902) 170 N. Y. 412. Whether the inference of a personal transaction is the natural one to draw, depends, of course, on the circumstances of each case. See *Hoag* v. *Wright* (1903) 174 N. Y. 36. (2) If the sole relevancy of the fact sought to be proved lies in its tendency to disclose a personal transaction, it is inadmissible. *Parker* v. *Parsons* (N. Y. 1903) 79 App. Div. 310. Since the statute was not intended to preserve the old common-law disqualification of interested parties, but was meant to allow such parties to prove independent extraneous facts, the courts might well have required the application of both tests before refusing to admit, and in the majority of cases where the evidence is excluded, both tests are satisfied. Yet an analysis of the cases indicates that either alone may exclude. See *Parker* v. *Parsons, supra; Wadsworth* v. *Heermans* (1881) 85 N. Y. 639; *Adams* v. *Morrison* (1889) 113 N. Y. 152; *Lerche* v. *Brasher* (1887) 104 N. Y. 157.

In a case recently decided by the Appellate Division, it was held that the payee of a note made by the decedent could not show, as a qualification to identify the decedent's handwriting, that she had seen him write on various occasions. *Wilber* v. *Gillespie* (1908) 39 N. Y. Law Jour. No. 124. Proof of handwriting, no objection being made to the laying of the foundation, ought not to be excluded. *Hoag* v. *Wright, supra.* The genuineness of the signature is an extraneous fact, neither raising a natural inference of delivery, *Saratoga County Bank* v. *Leach* (N. Y. 1885) 37 Hun 336, nor relevant only

as tending to show delivery, since the authorship of the instrument is also in issue. It is submitted, however, that the case was correctly decided in view of the tendency of the holdings of the Court of Appeals. The objection was taken, not to the witness's proving the genuineness of the signature, but to the method by which she attempted to establish her knowledge of the decedent's handwriting. She was testifying to impressions of conduct derived from her observation of acts of the decedent, which he, if alive, could have denied. The case is clearly within the second test laid down at the beginning of this discussion, and is supported by the *Eysamen* case. The case of *Wing* v. *Bliss* (1889) 8 N. Y. Supp. 500, affd. on opinion below, (1893) 138 N. Y. 643, which is apparently contra, rests solely on the authority of *Simmons* v. *Havens* (1886) 101 N. Y. 427, which merely decided that the witness might testify as to the genuineness of the signature, no objection being made to the laying of the foundation. On the other hand it has been held that, where the existence of a partnership is in issue, an interested witness may not testify that he saw the decedent write the partnership name in a firm book. *Adams* v. *Morrison* (1889) 113 N. Y. 152. It may, however, be argued that only evidence concerning personal transactions relevant to the issue should be excluded, and not evidence introduced merely for the purpose of laying a foundation. This distinction is arbitrary, and finds no support in the language of the section. The case, while extreme, is to be supported.

PROPERTY IN A POWER.—How far an absolute and beneficial power confers upon the donee incidents of ownership in the property subject to appointment, is a question which has been unsatisfactorily answered. A judgment can only be satisfied, whether by legal or equitable execution, from the property of the debtor. At law, a power of appointment did not give the donee title to the property subject to the power, and, therefore, such property could not be reached by legal execution. Courts of equity, however, for a time considered a right of enjoyment coupled with an absolute power of beneficial appointment as equivalent to the absolute property. The donee of such a power was "owner in Equity." *Ashfield* v. *Ashfield* (1693) 2 Vern. 287. A century later, an estate subject to the appointment of an equitable life tenant was said to be "as absolutely hers as any other part of her property," and passed under the residuary clause of her will. *Standen* v. *Standen* (1795) 2 Ves. Jr. 589; and see *Bainton* v. *Ward* (1741) 2 Atk. 172. But this attitude was finally repudiated, and some fine lines were drawn between powers and property. *Bradley* v. *Westcott* (1807) 13 Ves. Sr. 445; *Barford* v. *Street* (1809) 16 Ves. Jr. 135. The distinction, however, was so firmly established that in *Ex parte Gilchrist* (1886) 17 Q. B. D. 512, Fry, L. J., was moved to say, "No two ideas can be more distinct the one from the other than those of 'property' and 'power.' A 'power' is an individual and personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial, the general nature of the power does not make it property. * * * I am almost ashamed to deal with such an elementary proposition."

Yet, in certain cases, equity will assist a creditor. If the donee appoints by deed or will to a volunteer, the property, real and personal, becomes assets

for the payment of his debts. *Townshend* v. *Windham* (1750) 2 Ves. Sr. 1. Equity further aids the defective execution of a power in favor of creditors, purchasers for value, and meritorious claimants. *Tollet* v. *Tollet* (1728) 2 P. W. 490. Or if a mere intention is shown by the donee to execute the power in discharge of legal or natural obligations, the court will operate on the conscience of the heir,—or of persons entitled in default,—to make him perfect his intention. *Chapman* v. *Gibson* (1791) 3 Bro. C. C. 229. But equity will not aid the non-execution of a power not in trust. That could not be done without "striking at once out of the books the very notion and character of a power." *Holmes* v. *Coghill* (1806) 12 Ves. Jr. 206.

This equitable relief grew out of cases which, though rightly decided on other grounds, were based upon equity's early conception of an absolute power; it was retained and extended after that conception had been abandoned. The results reached, as might be expected, are both inconsistent and illogical. *Thompson* v. *Towne* (1694) 2 Vern. 319 is said to have originated the doctrine of appointed powers as equitable assets. *Clapp* v. *Ingraham* (1879) 126 Mass. 202; but see *Ashfield* v. *Ashfield* (1693) 2 Vern. 287. That case, in which the donee of the power was himself the settlor of the estate, is clearly distinguishable from those cases subsequently brought within the same rule, but in which the donee appoints property which he has never owned. The estate subject to appointment must either be the property of the donee, or it must be vested in the donor or remainderman. If it is the property of the donee it should be reached by equitable execution though unappointed. In the other alternative, either the donor or the remainderman has a right that his interest shall not be divested except by appointment in accordance with the terms of the power, and equity's aid of a defective appointment infringes that right not less than would a total execution of the power by equity itself. In the case of a good appointment, but made to volunteers, the latter should take unless the court can say that the donor has sought to impose an unlawful restraint on alienation, in which case the appointment may justly be treated as a voluntary conveyance of the donee's property in fraud of creditors. Thus if the court of equity were consistent it would execute a power quite as readily as it aids a defective execution, while if it were logical it would respect absolutely the terms granted by the donor in giving the power, or else declare that the donor had failed in his attempt to create property rights without their corresponding obligations.

The doctrine of appointed powers as equitable assets serves, therefore, to show that there can be no middle ground between powers and property. Its persistence is undoubtedly due to the feeling that some powers amount, in substance, to property, but the origin and continued use of a power as a mere agency of the donor has prevented the courts from judicially recognizing them as such. Legislation, however, has done so in certain cases. Thus in England, the property of a bankrupt comprises the capacity to exercise all beneficial powers. Bankruptcy Act of 1883 § 44. So a judgment is a charge on lands subject to the debtor's beneficial appointment. 1 & 2 Vict. c. 110, s. 13. With these exceptions it is still true that a power will not be appointed involuntarily. Creditors, therefore, have no recourse to property subject to appointment if the donee dies insolvent, not being a bankrupt or a judgment debtor. In New York powers as they existed on

December 31, 1829, were abolished. To the minds of the New York Revisors it was "an affront to common sense to say that a man has no property in that which he may sell when he pleases and dispose of the proceeds at his pleasure," and from that view-point they wrote a new law of powers. Under it, a power by which a donee may dispose in his lifetime of the entire fee for his own benefit, if no remainder is limited, gives the donee the absolute property. Where a remainder is limited the donee has a fee as regards creditors, purchasers and incumbrancers; so also where he is given a beneficial power to appoint by will, coupled with an estate for life or for years. Real Prop. Law, §§ 129-133; *Deegan* v. *Wade* (1895) 144 N. Y. 573. But it has been held that the exercise of a beneficial power by the will of an *equitable* life tenant does not subject the *corpus* of the trust estate to the claims of creditors. *Cutting* v. *Cutting* (1881) 86 N. Y. 522. Thus the doctrine of appointed powers as equitable assets, which was formerly applied in New York, *Tallmadge* v. *Sill* (N. Y. 1855), 21 Barb. 34, is no longer law. In a recent case, it was held, however, that if such a life tenant has a power of appointing the entire equitable fee by deed, though the legal title cannot be passed during the term of the trust, an interest has been conveyed which creditors may reach. *Farmers' Loan & Trust Co.* v. *Kip* (N. Y. 1908) 85 N. E. 59 (*semble*). Legislation on powers, such as that of New York, has destroyed to a large extent the integrity of a very highly developed and intricate branch of the common law, but in practice it is probable that greater justice is obtained. A power *as such* has not been converted into property. But while at law an absolute power gave property only if appointed to the donee himself, and in equity an *exercise* of the power to volunteers was at once a receipt of property by the donee and his fraudulent conveyance of it, under the New York Statutes the power *unexercised* in some cases invests the property subject to appointment with many incidents of ownership in the donee, in other cases vests in him the absolute property.

Aspects of the Right to Recover for Benefits Conferred under Mistake of Fact.—The limits of the right to recover *quasi ex contractu* for benefits conferred are, from the nature of the remedy, uncertain. Of course, enrichment at the plaintiff's expense is alone not enough to bind the defendant *ex æquo et bono*: as when the benefit was intended as a gratuity; or resulted as an inevitable incident to benefits secured to the plaintiff. *U. S.* v. *Pac. R. R.* (1887) 120 U. S. 227. A subsequent adoption of a benefit originally unrequested, though ineffective to ground an action in pure contract, (since the "consideration" would be "past") *Thomson* v. *Thomson* (N. Y. 1902) 76 App. Div. 178, may, however, render the adoptor liable *quasi ex contractu*. But often the benefit is incapable of rejection, e. g., repairs by one tenant in common, *Leigh* v. *Dickinson* (1884) 15 Q. B. D. 60; and, it seems, acceptance must consist in some positive act, such as pleading the stranger's payment in a suit by the creditor. Cf. *Goodnow* v. *Stryker* (1883) 61 Ia. 261. Affirmative steps toward avoiding an unsolicited benefit do not seem to be required. The fundamental notion is that no one can thrust himself on another as a creditor, either by improvement of his property or discharge of his obligation. The assignability of debt claims

is an exception, not to be widened by the grant of quasi-contractual remedies. But see *Crumlish* v. *Cent. Imp. Co.* (1893) 38 W. Va. 390.

It might seem that the considerations of policy and of natural justice affecting a conscious intermeddler should not defeat a person who has acted under mistake. But from the recipient's point of view, an unsolicited benefit is not changed in character because dictated by mistake. True, Equity often decrees compensation for permanent improvements to land under mistake of title. *Bright* v. *Boyd* (1841) 1 Story 478. But recovery in assumpsit under these circumstances is denied, *Welch* v. *Welch* (Ohio 1835) 5 Hammond 425; see Keener, Quasi-Contracts, 366 *et seq.;* likewise, where the property is personalty. *Isle Royale Mining Co.* v. *Hertin* (1897) 37 Mich. 332; but see Keener, *supra,* 385-6. Some few jurisdictions do allow recoupment *quasi ex contractu,* as well as in Equity, for tax-payments under mistaken belief of ownership, *Govern* v. *Russ* (1904) 125 Ia. 188; but this is a very questionable exception to the ordinary case of the discharge of any liability by a stranger. See *Janeway* v. *Burns* (N. Y. 1904) 91 App. Div. 165, 171; aff'd (1905) 180 N. Y. 560; Cooley, Taxation (3rd Ed.) 824. In laying down the broad rule that voluntary payments are not recoverable, the authorities reveal no conception of a payment as involuntary unless it has resulted from compulsion arising from circumstances with which the beneficiary is fairly to be associated. Cf. *Carr* v. *Stewart* (1877) 58 Ind. 581, 584; *Nat'l Bk.* v. *Bd. of Supervisors* (1887) 106 N. Y. 488, 494. In general, it is difficult to find any well settled right of recovery for benefits conferred under mistake of fact except where the mistake occurred in pursuance of some contractual relation, real or supposed, to which the defendant was in effect a party, as in the familiar case of failure of consideration.

Suppose that A, under mistake of fact, pays money to X, which X either passes to B directly or applies to B's debts. If B receive the money *bona fide* and for consideration, he may retain it, because commerce requires money so received in the course of business to be free of prior equities. *Stephen* v. *Bd. of Educ.* (1879) 79 N. Y. 183. In New York this rule is applied even where X uses A's money to restore misappropriated funds of B without B's knowledge either of the restitution or of the theft. *Nassau Bk.* v. *Nat'l Bk.* (1899) 159 N. Y. 456. This extension loses sight of the professed reason of the rule, and is referable rather to the theory that, the equities being equal, the legal title must prevail. But when X was B's agent, it may be questioned whether the principal, rather than A, should not, in equity, suffer from his agent's fraud. The result in *Read* v. *Rigby* L. R. [1894] 2 Q. B. 40, contrary to *Nassau Bk.* v. *Nat'l Bk., supra,* on similar facts, seems therefore preferable. Of course, if B had notice that A paid X as B's assumed agent, he is not in the position of a *bona fide* purchaser, and his acceptance may well be treated as a ratification of X's act. *Hathaway* v. *County of Delaware* (1906) 185 N. Y. 368. Now suppose that X, instead of paying the money to B directly, applies it to B's debts. If X has been authorized to discharge such debts, though not to borrow from A, recovery by A may fairly be granted, since practically B's affairs have not been disturbed. *Billings* v. *Monmouth* (1881) 72 Me. 174; but see *Agawam Nat'l Bk.* v. *So. Hadley* (1880) 128 Mass. 503. But the *mere* fact that B's debts have been paid with A's money would not alone obligate

B to A any more than if A had directly discharged them. *Kelley* v. *Lindsey* (Mass. 1856) 7 Gray 287. It has been further objected—inconsistently, it is submitted, with the equitable nature of the remedy—that A's relation to B is too remote: *Kilgour* v. *Finlayson* (1789) 1 H. Bl. 155: A enabled X to make the payment, but as it was X who chose so to apply the money, the benefit came from X rather than from A. *Nat'l. Bk.* v. *Bd. of Sup'rs, supra,* 494.

Some of these questions, it is conceived, were really involved in a recent New York case. *Title Guarantee & Trust Co.* v. *Haven* (1908) 111 N. Y. Supp. 305. The plaintiff (A) had accepted and paid a check, the signature of the maker of which was forged. The payee, the City of New York, applied it, at the forger's (X's) direction, without the defendant's (B's) knowledge, to discharge a lien against land which the defendant had already contracted to sell unencumbered and which he later so conveyed. Clearly the defendant was enriched to the amount of the lien, and at the plaintiff's expense. The benefit, however, was unsolicited, and, as the lien had been discharged of record, could not, it seems, be rejected. Moreover, as the benefit came from the payee of the check directly or as agent of the forger rather than from the plaintiff, it may be considered too remotely connected with the plaintiff, within *Nat'l Bk.* v. *Bd. of Supervisors, supra.* On the other hand, if the defendant restore, he will be no more out of pocket than if the whole transaction had never occurred, and so is not in the position of one who, if compelled to pay for unrequested improvements of his property, must invest additional capital. And the objection against sanctioning any disturbance of one's affairs by a stranger loses some force in this case in view of the contract (already partly performed) to convey the land unencumbered. *Stephen* v. *Bd. of Education, supra,* is not controlling, since here the defendant gave no consideration. Because of the exceptional circumstances, a recovery *quasi ex contractu,* would, it is submitted, conform to the broad conception of the remedy. But a denial of recovery finds support in the (somewhat meagre) authorities, especially *Nat'l Bank* v. *Bd. of Supervisors, supra.*

The Court (two judges dissenting) took the short ground that recovery was precluded by § 112 of the Negotiable Instruments Law: "The acceptor by accepting admits the genuineness of" the drawer's "signature." But the sole aim of the Negotiable Instruments Law, it would seem, is the currency of negotiable paper. How one who has surrendered nothing on the faith of an instrument can have been within the intent of the statute, is difficult to see. The corresponding section of the British Bill of Exchange Act, 45 & 46 Vict. c. 61, § 54 (2), expressly limits the drawee's admission to holders in due course; and in *Price* v. *Neal* (1762) 3 Burr. 1354, the repeatedly recognized source of the doctrine enacted by § 112, *supra,* the defendant was a *bona fide* holder for value, as in every subsequent available case. Cf. Story, Bills (4th Ed.) §§ 262, 411; Bigelow, Bills, etc. (2nd Ed.) 225. And the tendency has been to limit *Price* v. *Neal.* See Morse, Banking (3rd Ed.) Chap. XXXIII.

DAMAGES IN NEGLIGENCE CASES.—The fundamental distinction between the measure of the defendant's duty in determining whether a wrong has

been committed, and the measure of liability when a wrong has been committed, pointed out by Holmes, J., in *Spade* v. *Lynn etc. R. R. Co.* (1899) 172 Mass. 488, was recognized as applying to negligence cases by Blackburn, J., in *Smith* v. *London etc. Ry Co.* (1870) L. R. 6 C. P. 14 at 22, where it is said that while reasonable anticipation is important in considering whether the defendant has been negligent, it has no application in measuring damages resulting from the tort. *Sneesby* v. *Lancashire etc. Ry. Co.* (1874) L. R. 9 Q. B. 263; *Stevens* v. *Dudley* (1883) 56 Vt. 158. A person guilty of *some* injury by negligence is, therefore, liable for all damages which flow therefrom by ordinary natural sequence whether he could have foreseen them or not, if no independent cause intervenes. *McGarrahan* v. *New York etc. R. R. Co.* (1898) 171 Mass. 211; *Lehigh etc. Ry. Co.* v. *Marchant* (1898) 84 Fed. 870. Some cases embody this principle in slightly different terms, saying that the defendant is liable for the injury if in the light of the actual (and not apparent) state of affairs they appear to have been the natural and probable consequences of his negligence. *Marsh* v. *Paper Co.* (1906) 101 Me. 489; *Hill* v. *Winsor* (1875) 118 Mass. 251. Others assert that if consequences follow in unbroken sequence without an intervening cause, it is sufficient if the defendant might have foreseen that *some* injury might result. *Illinois Central R. R. Co.* v. *Siler* (1907) 229 Ill. 390; *Balt. etc. Ry. Co.* v. *Kemp* (1883) 61 Md. 74. These three statements are synonymous, making direct causal connection the test of damages, and while the last may apply equally to determine the actionability of the negligence, it of necessity excludes the test of reasonable anticipation as measuring the extent of damage.

Respectable authority, however, supports the view that the defendant is liable only for such damages as might have been foreseen. Pollock, Torts, 40. But many of the cases ordinarily cited for this position are not in point. They decide merely that no tort existed at all, since *none* of the injuries alleged might have been foreseen, and some injury must be foreseen to establish a breach of duty. *Milwaukee etc. Ry. Co.* v. *Kellogg* (1876) 94 U. S. 469. Moreover, the few cases which do directly maintain this test, rest for authority solely upon cases of the character just described. *Scheffer* v. *R. R. Co.* (1881) 105 U. S. 249. *Stewart* v. *City of Ripon* (1875) 38 Wis. 584, illustrates the forced interpretation of terms which must necessarily follow its application. That recovery in this case should have been allowed is sound, but to say that the aggravation of injuries by the plaintiff's constitutional tendency to scrofula was a result which should have been foreseen, is to make reasonable anticipation synonymous with direct causal sequence, and to rob it of virtue in its true sphere.

It is difficult to see why the defendant is not liable for all the direct consequences of a wrongful act whether negligence be its foundation or not. He is admittedly guilty of a tort toward the plaintiff for which, were it an assault, *Vosburg* v. *Putney* (1891) 80 Wis. 523, or a trespass, *Eten* v. *Luyster* (1875) 60 N. Y. 252, he would be liable for all direct results. It is said that the defendant's responsibility should be diminished where the wrong is unintentional, 8 A. & E. Encyc. 601, but aside from pure negligence cases there seems to be no such limitation. *West* v. *Forest* (1856) 22 Mo. 344 (unintentional assault and battery); *McAndrews* v. *Collerd*

(1880) 42 N. J. L. 189 (unintentional nuisance). In civil actions arising out of a breach of statute the test of reasonable anticipation has no place. *Smith* v. *Milwaukee etc.* (1895) 91 Wis. 360 (building requirements); *Salisbury* v. *Herchenroder* (1871) 106 Mass. 458 (hanging of signs). It is submitted, therefore, that the reasonable anticipation of the defendant should not measure the damage arising from his actionable negligence. 9 Harv. Law Rev. 80.

In a recent case a Pullman porter stole from a stateroom a bag containing medicines. As a result, the plaintiff, a woman in delicate health, and dependent on the medicines, collapsed physically. The court held the Pullman Company liable in negligence for its servant's acts, and repudiating the test of reasonable anticipation, gave damages for plaintiff's physical injury and mental suffering. *Bacon* v. *Pullman Co.* (1908) 159 Fed. 1. In conceiving an action for injury inflicted by the wilful act of the company's servant as an action for negligence, the court erred; 8 COLUMBIA LAW REVIEW 326; but assuming the case to be properly such, sound principles were applied. The delicate health of the plaintiff is not an intervening cause, *Crane Elevator Co.* v. *Lippert* (1894) 63 Fed. 942; note, 10 Am. State Rep. 64, and her mental suffering may be taken into account, *Homans* v. *Boston etc. Ry. Co.* (1902) 180 Mass. 456, if connected with bodily injury, Joyce, Damages § 220, and not caused merely by contemplation or worry over the possible results of the injury. *Maynard* v. *Oregon R. R. Co.* (1904) 46 Ore. 15. In jurisdictions where the cause of action consists of the wrongful act, and the injury to the person and property are regarded merely as different items of damage, Burdick, Torts, 213, the result in the principal case is to be supported. Where, however, personal rights are recognized as distinct from property rights, *Brunsden* v. *Humphrey* (1884) 14 Q.B.D. 141; *Reilly* v. *Sicilian Asphalt Co.* (1902) 170 N. Y. 40, and the act of the porter would support two actions, the rule of direct causal sequence in measuring damage would be limited. In an action for injury to property, no damages could be allowed for injury to the person, and *vice versa.* In the principal case, therefore, damages for physical collapse and mental suffering would be recoverable only if sufficient in themselves to support an action.

STATUTES OF REPOSE AND THE "DUE PROCESS" CLAUSE.—Statutes of Limitation, properly so called, are strongly favored by the courts, and their constitutionality unquestioned if a reasonable time is allowed for suit. See *Terry* v. *Anderson* (1877) 95 U. S. 628. They are commonly viewed as protective measures of a personal nature; the theory is that one who makes an adverse claim shall have the dispute settled before the facts are obscured or the evidence lost. *Riddlesbarger* v. *Hartford Ins. Co.* (1868) 7 Wall. 386. From a practical standpoint, the convenience of the courts may appear a further consideration; yet, theoretically, it is of little importance, since the statute may be waived. It is also said that failure to bring an action within a reasonable time raises a presumption against its original validity, *Battle* v. *Shivers* (1869) 39 Ga. 405, or that the right has been abandoned. *Gilfillan* v. *Union Canal Co.* (1883) 109 U. S. 401. A Statute of Limitations cannot, however, operate *ex proprio vigore* to transfer the ownership of property. Although in Massachusetts a statute has been

recently held constitutional providing for the distribution of property of an absentee after a certain period of time, thereby permanently divesting him of all rights therein, *Nelson* v. *Blinn* (Mass. 1908) 83 N. E. 889, the decision seems clearly wrong. Lapse of time does not of itself raise a conclusive presumption of abandonment of property, and transfer of property by a limitation of the remedy without adverse possession is unknown to our system of law. 8 COLUMBIA LAW REVIEW 501. Similarly, an equitable title may only be divested by the operation of a bar to the remedy after a repudiation of the trust and the assertion of entire ownership in the property, which not only must be open, but must be brought to the knowledge of the *cestui que trust.* Wood, Limitations (3rd Ed.) 464. Until that time, the possession of the trustee is deemed that of the *cestui.* *Hovendon* v. *Annesley* (1805) Sch. & Lef. 607.

Upon the theories of orthodox Statutes of Limitation and adverse possession, an Act of Congress of 1897, requiring money deposited in court, if unclaimed for ten years or longer, to be placed in a designated depository to the credit of the United States, is hardly justifiable as a constitutional measure. Such was the decision in a recent case. *American Loan & Trust Co.* v. *Grand Rivers Co.* (1908) 159 Fed. 775. As a statute of repose, it has none of the characteristics of a Statute of Limitation. Property *in custodia legis* is, at best, held by the court in trust for the claimant, and the trust would seem to be express within the meaning of the Statutes of Limitation. Cf. *United States* v. *Taylor* (1881) 104 U. S. 216; *New Orleans* v. *Fisher* (1899) 91 Fed. 574. Hence, no Statute of Limitation would properly begin to run before a breach of the trust. Of the considerations underlying Statutes of Limitation, *supra,* only the convenience of the courts is applicable; manifestly, obscuration of facts or loss of evidence can be no foundation for such a statute, nor a presumption against the original validity of the claim. Even assuming that a conclusive presumption of abandonment may be established by legislation, the period allowed can scarcely be considered reasonable. Cf. *Samson* v. *Samson* (1870) 39 L. J. Ch. 582. The Statute seems clearly improper in attempting to transfer the property of the claimant. In the most favorable aspect, the possession of the court may be considered that of the government; but even so, there is no adverse possession or claim. If the court be viewed as a *persona* distinct from the government, the latter is a total stranger to the fund, lacking even a trustee's possession.

Although novel and extreme statutes of repose, affecting individuals alone, have been held constitutional within the impairment of contract clause, *Gilfillan* v. *Union Canal Co., supra,* due apparently to the exigencies of the case, legislation virtually appropriating private property to the state should be more closely scrutinized under the "due process" clause to determine whether it conforms to the notions of justice established in the law with regard to the particular situation. Cooley, Const. Lim. (7th Ed.) 505, 506. From this standpoint, there is little basis for the validity of the Statute in question, in view both of the practice of England prior to the adoption of the Constitution and of the American precedents. All English legislation dealing with the suitor's fund in Chancery, while providing for the investment thereof, invariably preserved to suitors the right to have their claims satisfied whenever they might be presented. 12 Geo. II, c. 24

(1739); 4 Geo. III, c. 32 (1764); 5 Geo. III, c. 28 (1765); 9 Geo. III, c. 19 (1769); 14 Geo. III, c. 43 (1774). In New York, a law providing that court deposits unclaimed for twenty years should be paid to the State Treasurer, was held constitutional, *People* v. *Keenan* (1905) 110 App. Div. 537, since the claimants might still obtain their money on a court order. Laws of 1892, c. 651. A similar provision in §§ 661-664 of the Tennessee Code of Procedure was held valid for the same reason. *Deadrick* v. *County Court* (Tenn. 1860) 1 Coldw. 202. The only statute similar to the Federal Statute, which can be found is in Massachusetts, the constitutionality of which has not been passed upon. It would appear, therefore, that the claimant to money in court should have a durable right not to be impaired by any limitation of time. Moreover, the "due process" clause requires, in general, some form of procedure appropriate to the case, with proper notice to the person whose property is to be taken, so that he may assert his rights. *Davidson* v. *New Orleans* (1877) 96 U. S. 102. No such procedure has been provided by Congress. While the idea of repose and the convenience of the courts may be of sufficient strength to justify a statute of a more moderate character with proper procedure, the act in question seems unquestionably invalid.

RECENT DECISIONS.

NORMAN S. GOETZ, *Editor-in-Charge.*

ADMIRALTY—JURISDICTION—THIRD PARTIES.—A steamship company and a warehouseman, against whom the steamship company had a common-law cause of action only, were joined as respondents. The warehouseman was not originally liable in admiralty to the libellant. *Held,* the warehouseman could have been petitioned in and, therefore, could be sued as an original respondent. *Evans* v. *New York etc. S. S. Co.* (1908) 163 Fed. 405. See Notes, p. 648.

BANKRUPTCY—JURISDICTION—REPLEVIN.—A trustee petitioned a District Court to re-take property held by a sheriff under a state court's writ of replevin. *Held,* the court had no jurisdiction. *Matter of Rudnick & Co.* (1908) 20 Am. Bank. Rep. 33.

Under § 23b of the Act of 1898 the bankruptcy court cannot, without the consent of the defendant, determine an adverse claim. *Bardes* v. *Hawarden Bank* (1900) 178 U. S. 524, which is defined as the assertion of some title, interest, or right to the property of the bankrupt. See 1 COLUMBIA LAW REVIEW 189; 8 COLUMBIA LAW REVIEW 219. Earlier parallel decisions, however, have indicated a view contrary to the present case, construing § 67f, which avoids all levies, judgments, attachments or other liens secured within four months of the petition, as including replevin. *In re Haynes* (1903) 123 Fed. 1001; *In re Hymes Buggy Co.* (1904) 130 Fed. 977; *Matter of Weinger* (1903) 126 Fed. 875; cf. *In re Robinson and Smith* (1907) 154 Fed. 343. But these cases appear unsound since § 23b has been held to limit § 67f. *In re Tune* (1902) 115 Fed. 906; *Mueller* v. *Nugent* (1899) 91 Fed. 621. Thus while an attachment based on the assertion of property in the bankrupt, may be dissolved under § 67f; *In re Valentine* (1899) 2 Am. Bank. Rep. 522; if there be an execution sale under a levy, the proceeds cannot be reached as they are held adversely. *In re Knickerbocker* (1903) 121 Fed. 1004. So also, a writ of replevin is grounded on the assertion of property in the plaintiff, adverse to the bankrupt, and similarly jurisdiction should be refused. However, the situation in the principal case, substituting as it were, diligence for equality, is against the general policy of the Act and seems to call for further legislation. See *Mitchell* v. *McClure* (1899) 91 Fed. 621, 623.

CONSTITUTIONAL LAW—DUE PROCESS—STATUTES OF REPOSE.—An Act of Congress provided that money deposited in court, unclaimed for ten years or longer, should be paid over to the credit of the United States. A motion was made that certain unclaimed money, deposited in court in 1893 to be paid *pro rata* to the bondholders of a corporation, be thus paid to the United States. *Held,* the Act was unconstitutional. *American Loan & Trust Co.* v. *Grand Rivers Co.* (1908) 159 Fed. 775. See Notes, p. 658.

CORPORATIONS—SIGNATURE—RATIFICATION AND ADOPTION.—An alleged contract, between two corporations, providing for services not to be performed within one year, bore the typewritten signature of the defendant corporation, without the additional signature of an authorized agent. *Held,* there was not a proper signing of the corporate name and no subsequent recognition of such signature could be an adoption. *The Richmond Steel Spike etc. Co.* v. *The Chesterfield Coal Co.* (1908) 160 Fed. 832.

A mark appearing in any part of the memorandum is a signature within the meaning of the Statute of Frauds if a party's name is thereby intended to be signified. *Snyder* v. *Norris* (1814) 2 M. & S. 286; *Durrell* v. *Evans* (1862) 1 H. & C. 174. No manual act is required; a printed name is sufficient. *Tourrep* v. *Cripps* (1879) 48 L. J. Ch. n. s. 567. A signing by a third person is binding if the party sought to be charged consented to the writing of his name. *Clason* v. *Bailey* (1817) 14 Johns. 484. Corporations may sign as individuals, Angel & Ames, Priv. Corp. 219, and if the

agent sign, the fact of procuration need not appear. *Nat'l Bank* v. *Martin* (1891) 82 Ia. 442. Since in the principal case the corporation consented to the writing down of its name the decision is erroneous. The case is also illustrative of a too frequent indiscriminate use of the terms "ratification" and "adoption." Ratification, the subsequent authorization of an unauthorized act or contract made in behalf of the principal, *McArthur* v. *Times Printing Co.* (1892) 48 Minn. 319, relates back to the time of the act from which time the contract dates. The principle must have been in existence at that earlier time. *Stansby* v. *The Boat Co.* (1869) 2 Daly 898. When, however, an act is performed for a then non-existent principal who later assumes it, or for the actor, and is assumed subsequently by a third party as his own it is then adopted. There is no relation back and a new contract is entered into between the adopter and his contractee upon the terms of the previous one. *Battelle* v. *Northwestern Cement & Concrete Pavement Co.* (1887) 37 Minn. 89.

Deeds—Insertion of Grantee's Name After Delivery.—A grantor delivered a deed with parol authority to the grantee to insert his own name therein. *Held,* grantee took title under the deed. *Einstein* v. *Holladay-Klotz Co.* (Mo. 1908) 111 S. W. 859.

The weight of modern authority in this country is that an agent acting under parol authority may insert the grantee's name in a deed and make delivery. *Cribben* v. *Deal* (1891) 21 Ore. 211. But except where the grantor is bound by estoppel, *Phelps* v. *Sullivan* (1885) 140 Mass. 36, or by ratification, *Devin* v. *Himes* (1870) 29 Ia. 297, (neither element present in the principal case) the decisions have gone no further than to allow the grantee's name to be so inserted before the delivery of the conveyance to him. See *Allen* v. *Withrow* (1884) 110 U. S. 119, 129. *Contra, Treadgill* v. *Butler* (1884) 60 Tex. 599. Title does not pass until the delivery, Shep. Touch. 57; *Xenos* v. *Wickham* (1863) 14 C. B. N. S. 435, 473, of a completed deed. *Duncan* v. *Hodges* (S. C. 1827) 4 McCord 239. Delivery is a matter of intention, *Weber* v. *Christen* (1887) 121 Ill. 91, and is complete when the parties intend that title shall pass. *Ruckman* v. *Ruckman* (1880) 32 N. J. Eq. 259, 261. Manifestly, where the parties intend delivery to be complete only upon the filling in of the blanks, the deed (except possibly on grounds of public policy, see *Burns* v. *Lynde* (Mass. 1863) 6 Allen 305, 311) may be sustained. See *Van Etta* v. *Evenson* (1871) 20 Wis. 33. But in the principal case the intention clearly was that the grantee should be invested with title when he received the deed. Such delivery as there was took place at that time. But as no title could pass under the incomplete deed then delivered, and as there was never any redelivery of the completed deed, it is not apparent how the grantee's title is to be sustained.

Easements—Ancient Lights—Implied Grants.—An owner of adjoining lots conveyed to the plaintiff one with a house thereon, the windows of which overlooked the other lot. He now seeks to enjoin an obstruction of his windows by an erection on the lot retained. *Held,* there was an implied grant of the easement of light and air. *Fowler* v. *Wick* (N. J. 1908) 70 Atl. 682.

The general rule is that easements reasonably necessary to the enjoyment of a part of property granted will be implied, but easements in favor of the portion retained will not be, with the one exception of ways of necessity, *Pinnington* v. *Galland* (1853) 9 Ex. 1; *Wheeldon* v. *Burrows* (1878) L. R. 12 Ch. Div. 31, though some jurisdictions do not recognize the distinction, *Greer* v. *Van Meter* (1896) 54 N. J. Eq. 270. An easement, to be implied, must be open, visible and continuous, as well as necessary. *Whiting* v. *Gaylord* (1895) 66 Conn. 337. There is a conflict of authorities as to whether a negative easement as light and air, has the necessary elements. In England the doctrine of lights is both well settled and well known. There is no considerable mobility of titles. Naturally, then, a grantee is presumed to have an unrestricted right to lights unless that was not the intention of the parties. *Myers* v. *Catterson* (1889) L. R. 43 Ch. Div. 470. An implied reservation of such an easement, however, is not allowed. *Ellis* v. *Carriage*

Co. (1876) L. R. 2 C. P. D. 13. But the general mobility of titles in the United States and the dislike of rights of so indefinite a character have led to the rejection of this doctrine in most jurisdictions, not only as in conflict with the policy of registration laws, *Robinson* v. *Platt* (1895) 65 Conn. 365, but also as productive of litigation and embarrassing to the improvement of the estates. *Keats* v. *Hugo* (1874) 115 Mass. 205. In several jurisdictions it may be implied where actually necessary to enjoyment, but not even then, if the grantee can provide other lights at a reasonable cost. *Turner* v. *Thompson* (1877) 58 Ga. 268; *Rennyson's Appeal* (1880) 94 Pa. St. 147. The principal case approximates this latter rule.

EVIDENCE—PERSONAL COMMUNICATIONS UNDER SEC. 829, N. Y. CODE CIV. PROC.—In an action brought on a promissory note against the executor of the deceased maker, the plaintiff, in order to lay a foundation for identifying the decedent's handwriting, attempted to show that she had seen him write on various occasions. *Held,* the evidence was inadmissible under Sec. 829, N. Y. Code Civ. Proc. *Wilber* v. *Gillespie* (1908) 39 N. Y. Law Jour. No. 124. See Notes, 650.

EVIDENCE—TESTIMONY AT FORMER TRIAL—INTRODUCTION OF CROSS-EXAMINATION.—At a trial for murder, the state introduced the direct and cross-examination of one of its witnesses at a former trial, who had since died. The defendant objected to the admission of the cross-examination. *Held,* the evidence was admissible. *Pratt* v. *State* (Tex. 1908) 109 S. W. 138.

Under the Hearsay Rule, barring exceptions, no evidence, the truth of which has not been guaranteed by cross-examination, is receivable. Wig. Evid. § 1362; *Minn. Mill Co.* v. *Minn. R. R. Co.* (1892) 51 Minn. 304. Testimony at a former trial and depositions may be regarded as analogous, see Wig. Evid. §§ 1370, 1401 *et seq.,* and satisfy the Hearsay Rule. *Chase* v. *Springville Mills Co.* (1883) 75 Me. 156; *U. S.* v. *Macomb* (1851) 5 McL. 286. Depositions, once filed, are in the custody of the court, the property of neither party, *Nash* v. *State* (Ia. 1849) 2 Greene 286, and the direct and cross-examination may be used, irrespective of who conducted them. *Hale Bro.* v. *Gibbs* (1876) 43 Ia. 380. Similarly, it is submitted, the testimony of a witness at a former trial becomes evidence in the case, *Evans* v. *Reed* (1875) 78 Pa. St. 415, and, subject to proper objection, may be introduced by either party. See *Hudson* v. *Roos* (1889) 76 Mich. 173. It is not a mere substitute for personal examination in court, allowing counsel the privilege of determining the questions and answers to be introduced. Thus, if competent when originally given, it is admissible although the witness has subsequently become disqualified through interest. *Pratt* v. *Patterson* (1876) 81 Pa. St. 114; *Bowie* v. *Hume* (1898) 13 D. C. App. 286. The principal case may accordingly be sustained.

EVIDENCE—TESTIMONY OF SUBSEQUENT REPAIRS.—The plaintiff was injured by a defective machine. Witness A testified to subsequent repairs. Witness B was later shown a photograph of the repaired machine, and testified as to the character of the repairs. The defendant objected to the testimony of both. *Held,* by divided court, all the testimony was admissible. *Plunkett* v. *Clearwater Bleachery etc. Co.* (1908) 61 S. E. 431.

Evidence of repairs made after an accident is not admissible as an admission of negligence, because the inference is an unjust one to draw and public policy forbids it. *Morse* v. *Minn. etc. R. R.* (1883) 30 Minn. 465. Some courts have allowed its introduction, not as an admission of negligence, but as an admission that the place was defective, *St. L. & S. F. R. R.* v. *Weaver* (1886) 35 Kan. 412, but, in general, the same reasons operate to exclude in this case as operate in the former. *Corcoran* v. *Village of Peekskill* (1888) 108 N. Y. 157. The nature of subsequent repairs may, however, be shown to rebut testimony of the defendant in regard to the condition of the place after the accident, *City of Taylorville* v. *Stafford* (1902) 196 Ill. 188; *Choctaw etc. R. R.* v. *McDade* (1903) 191 U. S. 64, and it is submitted that, wherever evidence of the condition of the place after the accident has been introduced by either party, and it becomes necessary, in determining the condition of the place at the time of the accident, to show

the nature of the changes subsequently made, such evidence should be admitted under proper safeguards. See *L. & N. R. R.* v. *Malone* (1895) 109 Ala. 509. It is not introduced as an admission, and hence no rule of public policy excludes. In the principal case, the testimony of A was relevant only as an admission and, therefore, should have been excluded, while the testimony of B, under the foregoing principles, was correctly admitted.

GUARDIAN AND WARD—CONFLICT OF LAWS—FOREIGN GUARDIAN.—One under guardianship "by reason of physical disability" in New Hampshire, was adjudged a bankrupt in Vermont where he had resided for a year with his guardian's consent. *Held,* the foreign guardian could not vacate the adjudication. *In re Kingsley* (1908) 160 Fed. 275.

The jurisdiction to appoint guardians of infants was inherent in Chancery, Woerner, Guardianship § 16, while that of lunatics was derived from the King as *parens patriæ. In the Matter of Colah, a lunatic.* (N. Y. 1871) 3 Daly 529. All guardians, however, were under the supervision of the Chancellor. 1 Bl. Comm. 463. Guardianship of spendthrifts, etc., is a statutory extension of that over lunatics. Cf. Woerner, *supra,* § 114. Courts in laying down rules have failed to realize these several origins. Cf. *Morgan* v. *Potter* (1895) 157 U. S. 195. The relation between an infant and his guardian is governed, similarly to administration of a decedent's personal estate, by the law of the infant's domicile, *Lamar* v. *Micou* (1885) 114 U. S. 218; Story, Conflict of Laws (8th Ed.) 694, but that between guardians and other incompetents should be governed by the law of jurisdiction appointing the guardian. *In the Matter of Colah, supra; Ibid.* 6 Daly, 308. Further, it is said that a ward upon leaving the jurisdiction that appointed his guardian at once becomes *sui juris. Gates* v. *Bingham* (1881) 49 Conn. 275. This is obviously impossible if the ward is an infant, due to the nature of the disability; but if the ward is a spendthrift, it is true simply because the guardian's authority is derived from a statute and purely local. Hence the statement in the principal case that the guardian consented to the ward's residing in Vermont was irrelevant. The conclusion of the principal case, however, is correct, though the result was reached on the somewhat superficial reasoning common to this subject, due probably to the existence of statutes affecting guardianship.

HIGHWAYS—OBSTRUCTIONS—RECOVERY BY NON-ABUTTER.—A hotel keeper sued a railroad company for damages caused by obstructing streets not adjacent to her property but furnishing the most convenient access thereto. *Held,* that the plaintiff could recover under a constitutional provision requiring compensation for property taken or damaged. *Illinois Central Ry. Co.* v. *Elliott* (Ky. 1908) 110 S. W. 817.

An abutter may recover for an obstruction which directly interferes with his right of access. *Putnam* v. *Boston & Providence R. R.* (1903) 182 Mass. 351. A non-abutter, like the general public, has a mere right of user, and to recover must show an injury differing in kind from that of the general public. *Gilbert* v. *S. L. & P. Ry. Co.* (1889) 13 Col. 501, and an action cannot be grounded upon mere difference in degree. *Buhl* v. *Fort Street Union Depot Co.* (1884) 98 Mich. 596. Courts differ widely in applying these generally accepted rules. The same sort of injury is held, on the one hand, to differ in kind, *Foust* v. *Penna. R. R. Co.* (1905) 212 Pa. St. 213, and on the other to differ merely in degree. *Dantzer* v. *Ind. Union Ry. Co.* (1895) 141 Ind. 604. Under provisions requiring compensation for property taken or "damaged" some courts still apply the common-law rule of special damage, while others hold that the word "damaged" extends the remedy to cases of actual injury though suffered in common with the rest of the public. *Rigney* v. *City of Chicago* (1882) 102 Ill. 64. The latter is the English view. *Caledonian Ry. Co.* v. *Walker's Trustees* (1881) L. R. 7 App. Cas. 259. Though difficult to apply, it has been accepted, as in the principal case, by many American jurisdictions and seems preferable.

INSURANCE—INSURABLE INTEREST—TRANSFER.—The defendant promised to support the plaintiff, his father, in consideration of the plaintiff's allowing

him to take out in his stead, insurance on the life of the plaintiff's wife. *Held,* that the contract was without consideration as no insurable interest was transferred by the agreement. *Schwerdt* v. *Schwerdt* (Ind. 1908) 85 N. E. 613.

To prevent gambling through insurance companies, *Ruse* v. *Mutual Ins. Co.* (1851) 23 N. Y. 516; May, Ins. (3rd Ed.) 75, every policy holder is required to have in the life insured an interest resting on pecuniary benefit, *Lewis* v. *Phœnix Ins. Co.* (1872) 39 Conn. 100, or, by the modern view in some jurisdictions, on close relationship. *Warnock* v. *Davis* (1881) 104 U. S. 775 at 779; Joyce, Ins. 888; but see *Guardian M. L. Ins. Co.* v. *Hogan* (1875) 80 Ill. 35. The assignment of a policy to one who has no insurable interest is by some courts held void as an evasion of the above rule. *Roller* v. *Bean* (1889) 86 Va. 512; *Franklin Ins. Co.* v. *Hazzard* (1872) 41 Ind. 416. In other jurisdictions such assignment unless obviously made for gambling purposes, is held valid on the ground that choses in action should be uniformly assignable. *Steinback* v. *Diepenbrock* (1899) 158 N. Y. 104; *Mutual Life Ins. Co.* v. *Allen* (1884) 138 Mass. 34. The principal case would be supported in either class of jurisdiction, for the arguments in favor of the assignability of a chose in action do not apply to the attempted transfer of the mere right to obtain a chose in action, while the arguments against the evasion of the rule as to wagering policies apply directly to the principal case. See *Burbage* v. *Windley* (1891) 108 N. C. 367.

INSURANCE—RECOVERY OF PREMIUMS—FRAUD—ESTOPPEL.—A wife insured her husband's life without his consent. Subsequently learning that such consent was necessary, she concealed the want of it from the insurance company. Later she sued to recover the premiums paid. *Held,* her subsequent concealment estopped her from denying the want of consideration. *Marling* v. *Metropolitan Ins. Co.* (1908) Ohio, Hamilton Co. C. P.

Provisions of an insurance policy are construed like provisions in other contracts. *Ins. Co.* v. *Pyle* (1886) 44 Oh. St. 19. An unperformed condition, precedent to liability, prevents the insurer from assuming the risk, *Metropolitan Ins. Co.* v. *Felix* (1905) 73 Oh. St. 46, accordingly the premiums paid should in good conscience be returned, *Tyrie* v. *Fletcher* (1777) Cowp. 666, unless the insured has been guilty of fraud. *Hoyt* v. *Gilman* (1811) 8 Mass. 336; *Friesmuth* v. *Agawan Mut. Ins. Co.* (Mass. 1852) 10 Cush. 587. But mere misrepresentation is not sufficient to bar recovery. *Feise* v. *Parkinson* (1812) 4 Taunt. 639; *Ins. Co.* v. *Pyle, supra.* Recovery is then denied because the law will not raise an obligation of an equitable nature to relieve one who has parted with money in an attempt to defraud. Cf. *Taylor* v. *Grand Lodge, A. O. U. M.* (1905) 96 Minn. 441. An estoppel requires misrepresentation and an actual change of position. Ewart Estoppel, 140, but see *Lewis* v. *Phœnix Mut. Ins. Co.* (1872) 39 Conn. 100. Clearly the doctrine of estoppel is misapplied in the principal case. The court finds neither fraud nor misrepresentation on the part of the plaintiff in securing the contract, nor was there any change of position as a result of her subsequent concealment. In the principal case, the court should have affixed the date of the beginning of the plaintiff's actual concealment and allowed recovery, at least, for premiums paid before that date.

INTERSTATE COMMERCE—LICENSE FEES—GROSS RECEIPTS.—A state law imposed a tax on railroads "equal to" one per cent. of their gross receipts, graduated according to mileage. *Held,* as to receipts from interstate business, the statute was invalid. *Railway Co.* v. *Texas* (1907) 210 U. S. 217.

A state tax on persons, *Crandall* v. *Nevada* (1867) 6 Wall. 35, or goods, *State Freight Tax* (1872) 15 Wall. 232, transported from state to state, is invalid as a regulation of commerce. On principle, a tax on the receipts of such carriage is equally objectionable, and, though sustained in earlier cases, see *State Tax on Gross Receipts* (1872) 15 Wall. 284, is now uniformly held void. *Steamship Co.* v. *Pa.* (1887) 122 U. S. 326; *Telegraph Co.* v. *Seay* (1889) 132 U. S. 472. A state, however, may require a license fee from a corporation engaged in interstate business, if exacted only for

the privilege of doing intrastate business. *Pullman Co.* v. *Adams* (1903) 189 U. S. 420. The amount of this fee, it has been held, may be measured by the gross receipts apportioned to mileage. *Maine* v. *Ry. Co.* (1891) 142 U. S. 217. But a distinction between a license fee "equal to," and one "upon" such receipts is unsound, see 7 COLUMBIA LAW REVIEW 530; Cooke, Com. Clause, Sec. 73a, and inconsistent with *Steamship Co.* v. *Pa., supra.* See Prentice, Com. Clause, 272. Although the principal case attempts to justify *Maine* v. *Ry. Co., supra,* on its facts, yet its disapproval of the above mentioned distinction is emphatic, and that case is in effect overruled. The decision in the principal case is fortunate in marking a return to the rule of *Steamship Co.* v. *Pa., supra.*

LANDLORD AND TENANT—BREACH OF AGREEMENT TO REPAIR—A TORT.—The plaintiff leased premises from defendant who knowing a floor to be defective agreed to repair. *Held,* personal injuries are recoverable in a tort action based on the defendant's negligence. *Graff* v. *Lemp Brewing Co.* (Mo. 1908) 109 S. W. 1044.

Damages resulting from failure to perform certain contracts are recoverable in tort because they arise from a violation of the legal duties incident to the relationship (common carrier, innkeeper, etc.) established by the contract. Burdick, Law of Torts, 5-16. The relationship of landlord and tenant, however, does not impose upon the landlord any duty to repair, McAdam, L. & T. 1238, except in regard to those portions of the building which are under his control. *Dollard* v. *Roberts* (1891) 130 N. Y. 269. With this exception, therefore, a breach of an agreement to repair is not a violation of a tenant's legal right so as to support an action in tort, *Tuttle* v. *Gilbert M'f'g Co.* (1887) 145 Mass. 169, and personal injuries resulting from failure to repair are not recoverable, *Davis* v. *Smith* (1904) 26 R. I. 129, in the absence of some active negligence or misfeasance distinct from the mere breach of promise. *Tuttle* v. *Gilbert M'f'g Co., supra.* Thus in the principal case no tort action should be allowed. But see *Moore* v. *Steljes* (1895) 69 Fed. 518. The reasoning of *Thompson* v. *Clemens* (1903) 96 Md. 196 apparently *contra* fails to establish the breach of any duty other than that arising from contract. Assuming the existence of a duty and its violation by the landlord, the same test of negligence should be applied to the tenant to determine his contributory negligence. *Sanders* v. *Smith* (N. Y. 1893) 5 Misc. 1. In the principal case both parties having equal knowledge of the conditions, the decision in favor of the tenant appears unsound.

MUNICIPAL CORPORATIONS—LICENSEE—INDEPENDENT CONTRACTOR'S TORTS.—Plaintiff's child was killed by a gas pipe negligently secured on an inclined street by independent contractors for the defendant, which operated under the city. *Held,* defendant was liable. *O'Hara* v. *Laclede Gas Light Co.* (Mo. App. 1908) 110 S. W. 642.

Immunity from liability for an independent contractor's torts does not apply when the superior is under a special duty. *Smith* v. *Milwaukee Exchange* (1895) 91 Wis. 361. The duty of municipalities to keep streets in reasonably safe condition, though unknown to the English common law, *Morey* v. *Town of Newfane* (1850) 8 Barb. 645, is in this country, where not regulated by statute, generally implied from privileges of control over streets granted by charters or by state laws for the corporate benefit. Dillon, Municipal Corporations, (3rd Ed.) § 1014; Elliott, Streets and Roads (2nd Ed.) § 611; *Carsen* v. *City of Genesee* (1903) 9 Ida. 244; *Grove* v. *City of Ft. Wayne* (1874) 45 Ind. 429. The city is therefore liable for negligence of its contractors in the use of streets, *Storrs* v. *City of Utica* (1858) 17 N. Y. 104, either by *respondeat superior* or because the contract gives constructive notice of the unsafe condition, and the duty of care is not delegable to the contractor. *Village of Jefferson* v. *Chapman* (1889) 127 Ill. 438; *City of Savannah* v. *Waldner* (1873) 49 Ga. 316. The reasoning of the principal case is open to two constructions. If it rests on the theory of a duty delegated to the defendant it cannot be sustained since a duty not delegable to a contractor, is certainly not delegable to a mere licensee; if

on the theory that a licensee's privilege in the use of streets imposes a special liability analogous to the city's liability, it is supported by some authority, *Street Ry. Co.* v. *Dudgeon* (1900) 184 Ill. 477; *Benjamin* v. *Street Ry. Co.* (1895) 133 Mo. 274, 284, but see, *contra, Railroad* v. *McConnel* (1891) 87 Ga. 756; *Blake* v. *Ferris* (1851) 5 N. Y. 48, although the majority of cases generally cited to support this view rest mainly on considerations of nuisance, *Wiggins* v. *St. Louis* (1896) 135 Mo. 558, danger inherent in the work, *Loth* v. *Theatre Co.* (1906) 197 Mo. 328, or express stipulation for its careful conduct. *McWilliams* v. *Detroit Central Mills Co.* (1875) 31 Mich. 274.

NEGLIGENCE—MEASURE OF DAMAGES.—A Pullman porter stole from a stateroom a bag containing medicines. As a result, the plaintiff, a woman in delicate health, at the end of her journey was in a state of physical collapse. *Held,* damages were recoverable not only for the pecuniary value of the medicines, but also for the physical and mental suffering of the plaintiff. *Bacon* v. *Pullman Co.* (1908) 159 Fed. 1. See Notes, p. 656.

NEGLIGENCE—RISK IN SAVING LIFE OR PROPERTY.—A driver, whose team was stalled upon a railroad track as a result of the company's negligence, ran up the track to stop an approaching train and was killed. *Held,* that his act was not negligence *per se. Thompson* v. *Seaboard Air Line Ry. Co.* (S. C. 1908) 62 S. E. 396.

Due to the law's regard for human life, negligence will not be imputed to an effort to preserve it, *Eckert* v. *L. I. Ry.* (1871) 43 N. Y. 502, unless the attempt be unnecessarily rash; *Penn. Co.* v. *Langendorf* (1891) 48 Oh. St. 316; since the impulse to rescue is instinctive, the injury received is a proximate result of the negligence or misfeasance occasioning the original danger. *Gibney* v. *State* (1893) 137 N. Y. 1. It has been held that these principles do not extend to efforts made to save endangered property. *Eckert* v. *L. I. Ry., supra; Cook* v. *Johnson* (1885) 58 Mich. 437; *Morris* v. *L. S. & M. S. Ry.* (1896) 148 N. Y. 182. But generally it is not negligence *per se* to endanger one's self to save property, *Henry* v. *The Cleveland C. C. & St. L. Ry. Co.* (1895) 67 Fed. 426, the effort being regarded as natural and probable, *Wasmer* v. *D., L. & W. R. R. Co.* (1880) 80 N. Y. 212, and injuries thus received are proximate results, *Berg* v. *The Great Northern Ry.* (1897) 70 Minn. 272, even though the property endangered be that of another; *Liming* v. *Ill. Cent. Ry. Co.* (1890) 81 Ia. 246; *contra, Pike* v. *The Grand Trunk Ry.* (1889) 39 Fed. 255; though recovery is not permitted where no prudent man would incur the obvious danger. *Pegram* v. *The R. R.* (1905) 139 N. C. 303. Thus risking injury to save human life or property is not negligence *per se,* but in both cases such action is presumptively negligent. *Pegram* v. *The R. R., supra; Linnehan* v. *Sampson* (1879) 126 Mass. 506. In general this presumption in case of effort to save property is very much stronger than where life is to be rescued and one is not justified in exposing himself to as great a risk in saving property as saving human life.

NEGOTIABLE PAPER—EXTENSION—EFFECT ON NEGOTIABILITY.—A promissory note contained the clause, "the makers and indorsers * * * consent that time of payment may be extended without notice." *Held,* negotiable. *First Nat'l Bank of Pomeroy* v. *Buttery* (N. D. 1908) 116 N. W. 321.

Although the weight of authority is opposed to the principal case, Daniel Neg. Inst. (4th Ed.) 1, page 50; 7 Cyc. 600; *Woodbury* v. *Roberts* (1882) 59 Ia. 348; *Smith* v. *Von Blarcom* (1881) 45 Mich. 371; *Coffin* v. *Spenser* (1889) 30 Fed. 263, it finds increasing favor in several jurisdictions, *Farmer et al.* v. *Bank* (1906) 130 Ia. 169; *Bank* v. *Goodloe Co.* (1902) 93 Mo. App. 123; *Bank* v. *Kenney* (Tex. 1904) 83 S. W. 368, and seems to be the better view. The clause does not extend time of payment but merely guards against the necessity of securing the sureties' consent if the holder should contract with the maker to extend. See Norton Neg. Inst. (3rd Ed.) 306, 307. Contrary decisions hold that such clauses render the time of payment not only unascertainable by indorsees from the face of the note, but also

uncertain ultimately to arrive. Although by the strict principles adopted by the Law Merchant to promote the circulation of commercial paper, the date of payment must be fixed, it is now well settled that if the fact of payment be certain, though the time be uncertain, the note is negotiable. *Walker* v. *Roberts* (1842) Car. Mar. 590; *Bank* v. *Skeen* (1890) 101 Mo. 683. The possibility that an essential term will be ascertainable only from a collateral agreement does not of itself destroy the note's negotiability. *Wilson* v. *Campbell* (1896) 110 Mich. 580; *Chicago Ry.* v. *Merchants' Bank* (1889) 163 U. S. 268; and see *McClellan* v. *Norfolk Ry. Co.* (1888) 110 N. Y. 479. The contention that the note might never fall due seems negligible, since an agreement to extend for an indefinite time amounts to a release, and an agreement to extend left indefinite as to time is construed as for a reasonable time, *Capron* v. *Capron* (1872) 44 Vt. 410, and the possibility that repeated extensions of time might postpone the date of payment indefinitely is even more remote than in the case of negotiable sight notes. See *Protection Ins. Co.* v. *Bill* (1863) 31 Conn. 534.

Partnership—Test of Partner—Participation in Profits.—The plaintiff attempted to hold as a partner, A, who was to receive a share in the profits and interest for money advanced. A could inspect the books and his consent was necessary for certain loans. It was also stipulated that A was not a partner. *Held*, A was not a partner. *Russell* v. *Norton et al.* (1908) 39 N. Y. Law Jour. 2217.

The early rule in England, based upon the seeming injustice to creditors, that as regards third parties, persons sharing in profits should be viewed as partners though they were not such *inter se*, *Waugh* v. *Carver* (1797) 2 H. Bl. 235 was first shaken in *Cox* v. *Hickman* (1860) 8 H. L. Cas. 268, and has been departed from in later decisions. *Bullen* v. *Sharp* (1865) L. R. 1 C. P. 86. The old doctrine, however, distinguished cases where profits were given as compensation for services, *Williamson* v. *Frazier* (1803) 4 Esp. N. P. Cas. 182, or where a sum equal to a share was given. *Ex parte Hamper* (1811) 17 Ves. Jr. Rep. The present English theory conforms with the fundamental doctrine that a partnership is created by contract and not imposed by law; Burdick, Partn. 5, that the intention of the parties to carry on a joint business should govern and that the participation in profits is only presumptive evidence. *Badeley* v. *Con. Bank* (1888) L. R. 38 Ch. Div. 238. This doctrine has received general approval in this country. *Meehan* v. *Valentine* (1845) 145 U. S. 611; *Smith* v. *Knight* (1873) 71 Ill. 148; *Beecher* v. *Bush* (1881) 45 Mich. 188. In New York, however, in *Leggett* v. *Hyde* (1874) 58 N. Y. 272, the modern English principle was riscarded but later cases qualified the rule then adopted, *Richardson* v. *Hughitt* (1879) 76 N. Y. 55; *Cassidy* v. *Hall* (1884) 97 N. Y. 159, which was, however, reiterated in *Hackett* v. *Stanley* (1889) 115 N. Y. 625, and there seems a reversion to the strict following of the old view. *Lefevre* v. *Silo* (1906) 112 App. Div. 474. Though the principal case may be supported on appeal, and still reconciled with previous decisions, it would be desirable if the court clearly accepted the logical view of the English courts.

Pleading and Practice—Equitable Defense to Legal Cause of Action—Jury Trial.—In a legal action on a check, defendant intervened seeking a cancellation thereof. *Held*, the answer converted the case into one in equity which should have been tried without a jury. *Thompson* v. *Nat'l Bank* (Mo. 1908) 110 S. W. 618.

To a statutory legal action of foreclosure, legal and equitable defenses were interposed. *Held*, court may submit legal issues to a jury and try the equitable issues to the court. *Maas* v. *Dunmyer* (Okla. 1908) 110 S. W. 591.

In general the character of the action is determined by the complaint. *O'Bierne* v. *Bullis* (1899) 158 N. Y. 466. Accordingly, an equitable defense to a legal cause of action will not deprive plaintiff of his right to a jury trial. *Wolff* v. *Schaeffer* (1879) 4 Mo. App. 367. Nor will a legal defense to an equitable cause of action, make a jury trial a matter of right. *Mackellar* v. *Rogers* (1888) 109 N. Y. 468. But where the defendant sets up an independent equitable cause of action amounting to a cross-bill in equity

which, if established, destroys plaintiff's case, the action becomes one in equity and a jury trial is not a matter of right. *Buckner* v. *Mear* (1875) 26 Oh. St. 514; *Marling* v. *B. C. R. & N. Ry. Co.* (1885) 67 Ia. 331. This distinction is sound since here the plaintiff is not in fact deprived of his right to jury trial, for the defendant "concedes the plaintiff's right to recover unless the equity defense prevails." *Ridgeway* v. *Herbert* (1899) 150 Mo. 606, 612. The first principal case may be supported on this theory. Where, as in the second case, both legal and equitable issues are raised on the pleadings, they should be separated. *Fish* v. *Benson* (1886) 71 Cal. 428. While the defendant has a right to a jury trial of the legal issues, *Smith & Co.* v. *Bryce* (1881) 17 S. C. 538, 544, he cannot demand jury trial of the equitable issues as well. *Smith* v. *Moberly et al.* (Ky. 1854) 15 B. Mon. 70; *Weber* v. *Marshall* (1861) 19 Cal. 447. But New York is *contra. Davis* v. *Morris* (1867) 36 N. Y. 569. Accordingly both cases under consideration are sound.

Powers—Perpetuity—Property in a Power.—A testator created a trust in a share of real property in favor of his daughter F, and provided that upon the death of the survivor of his two daughters the share should go to F's appointees by deed or will, or in default of such appointment to her heirs. F by will created a trust in the same property for the life of an intended beneficiary. *Held,* F did not have an estate in fee and her appointment was void as a perpetuity, but (dictum) had a fee as to creditors. *Farmers' Loan & Trust Co.* v. *Kip.* (N. Y. 1908) 85 N. E. 59. See Notes, p. 652.

Quasi-Contracts—Money Paid Under Mistake of Fact—Negotiable Paper.—The plaintiff accepted and paid a check, the signature of the maker of which was forged. The payee, the City of New York, applied it, at the forger's direction, for his own purposes and without the defendant's knowledge, to discharge a lien against land which the defendant had already contracted to sell unencumbered, and which he shortly afterwards so conveyed. *Held,* recovery denied. *Title Guarantee & Trust Co.* v. *Haven* (1908) 111 N. Y. Supp. 309. See Notes, p. 654.

Real Property—Contingent Remainder—Executory Devise.—A testator gave a life estate to A with a limitation over to the first son who "shall attain, or have attained 21 years." *Held,* that the words created a contingent remainder and not an executory devise. *White* v. *Summers* (Ch. Div. 1908) 98 L. T. 845. See Notes, p. 646.

Sales—Express Statement of Implied Warranty.—Executory contract to supply carbureters "to be constructed in a workman-like manner." *Held,* the express warranty added nothing to the one that the law would imply. Plaintiff after acceptance cannot recover for defects in construction. *Heath Dry Gas Co.* v. *Hurd et al.* (N. Y. 1908) 40 N. Y. L. J., Nov. 4th.

The principal case rests on the authority of *Reed* v. *Randall* (1864) 29 N. Y. 358, and *Gaylord Mfg. Co.* v. *Allen* (1873) 53 N. Y. 515. *Reed* v. *Randall* held, a provision that the tobacco contracted for should be "well cured" was not an express collateral warranty. The words used were merely descriptive; a statement of the implied condition of merchantability, action upon which would not survive acceptance. *Reed* v. *Randall, supra,* 362. Later cases have refused to apply the rule where the defects are latent, *Parks* v. *Morris, etc., Co.* (1874) 54 N. Y. 586; *Carleton* v. *Lombard, etc., Co.* (1896) 149 N. Y. 137, or where the words can be construed as constituting a collateral warranty. *Zabriskie* v. *C. V. R. R. Co.* (1892) 131 N. Y. 72; *Bull* v. *Bath Iron Works* (1902) 75 App. Div. 380. If the court in the principal case regards the words of the contract merely as expressive of the implied condition of merchantability and not of an express collateral warranty, the result reached, except possibly on the ground that the defect was latent, (see opinion below, 128 App. Div. 68,) is sound under the New York rule. See *contra, Poulton* v. *Lattimore* (1829) 9 B. & C. 259; *Morse* v. *Moore* (1891) 83 Me. 472. But if in assuming, as the court does, that "the words of agreement were equivalent to those of warranty", it means equiva-

lent to collateral warranty, which even in New York survives acceptance, *Day* v. *Poole* (1873) 52 N. Y. 416, the reasoning of the case is opened to criticism. If the seller intended to enter into an express contract of warranty and thereby to preserve to the buyer the very right (i. e. the right to recover for defects after acceptance) which but for such express agreement he would lose by accepting the goods, there is no apparent reason why effect should not be given to this express contract.

SPECIFIC PERFORMANCE—CONTINUOUS ACTS.—Plaintiff sued to enforce defendant's contract to furnish the city's telephone service for twenty years. *Held,* that a decree should be granted. *Telephone Co.* v. *City of Hickman* (Ky. App. 1908) 111 S. W. 311.

The force of the rule that equity will not decree specific performance of contracts requiring continuous acts, because of its inability to enforce such decree, is weakened by the absence of a test determining what degree of duration or complexity renders acts unenforcible by equity. Story, Equity (13th Ed.) §725. The supposed doctrine that equity will not enforce contracts to build or repair, *Beck* v. *Allison* (1874) 56 N. Y. 366, is burdened with exceptions, Fry, Spec. Perf. (3rd Am. Ed.) 81, and its validity frequently denied. *Mayor* v. *Emmons* (1901) L. R. 1 K. B. D. 515; *Jones* v. *Parker* (1895) 163 Mass. 564. The practice of evading precedents by enjoining the breach instead of decreeing the performance of the contract, *Lane* v. *Newdigate* (1806) 10 Ves. 192; *Western Union Co.* v. *R. R.* (1880) 3 Fed. 423, also evidences the flexibility of the rule. The cases rest ultimately on a balancing of the contract's importance and the inconvenience of supervising enforcement. *Schmidtz* v. *L. & N. Ry. Co.* (1897) 101 Ky. 441, 479. On this principle equity generally denies specific performance of acts extending over many years. *Powell Duffryn Coal Co.* v. *Taff Vale Ry. Co.* (1874) L. R. 9 Ch. App. 331; *Marble Co.* v. *Ripley* (1870) 10 Wall. 339; but see, *Wolverhampton Co.* v. *London Co.* (1873) 16 Eq. 433, *contra,* but when, as in the principal case, public interests demand specific performance, American courts of equity will often decree it and if necessary supervise it for an indefinite period. *Joy* v. *St. Louis* (1890) 138 U. S. 1. Followed in *Franklin Telegraph Co.* v. *Harrison* (1891) 145 U. S. 459; *The Prospect Park, etc., Ry. Co.* v. *The Coney Island, etc., Ry. Co.* (1894) 144 N. Y. 152. And, aside from the possible political inexpediency of prolonged judicial interferences with private enterprise, these decisions seem sound.

TORTS—UNBORN INFANTS—RIGHT TO SUE.—A pregnant woman injured through the defendant's negligence subsequently gave birth to a deformed child. *Semble,* the child could not recover. *Prescott* v. *Robinson* (N. H. 1908) 69 Atl. 522.

At common law an assault upon a pregnant woman resulting in still birth was not murder, 3 Co. Inst. 50; but see Staunford P. C. 12. If, however, a child quick at the time of the assault died after birth it was regarded as a homicide. 1 Hawkins P. C. 31, s. 16, but see 1 Hale P. C. 433. Birth therefore must have been necessary either as evidence to prove that a living person had been injured or to constitute the *fœtus* a legal person. If birth serves only an evidentiary purpose the *fœtus* must be regarded as a legal person, and the right to sue admitted, but the burden would be upon the infant after birth to establish the causal connection between the act, or omission, and the injury. Bevan Negligence, pp. 84-86. Compare *The George and Richard* (1871) L. R. 3 Adm. 466, where the tort to the unborn child was established, and recovery allowed. Nor is this view vitiated by the unavailability thereunder of contributory negligence as a defense inasmuch as an infant is never bound to exercise a degree of care incommensurate with his mental and physical capabilities, *Roberts* v. *Terre Haute Elec. Co.* (1905) 37 Ind. App. 664; *Mowrey* v. *Central City Ry.* (N. Y. 1867) 66 Barb. 43, aff. (1873) 51 N. Y. 666. But by the decided cases birth is essential to legal existence, and recovery is denied the unborn child as one to whom there was no duty owing. Wherefore the *dictum* in the principal case is sound. *Allaire* v. *St. Luke's Hosp.* (1901) 184 Ill. 359; *Gorman*

v. *Budlong* (1901) 23 R. I. 169; *Dietrich* v. *Northampton* (1884) 138 Mass. 14; *Walker* v. *Great Northern Ry.* (1891) 28 L. R. Ir. 69.

TRUSTS—CHARITABLE TRUSTS—PARTIAL INVALIDITY.—A testator gave $6,000 to his executors in trust to apply the income: first, to keep in good condition her family burial lot; second, to keep in good condition the rest of the churchyard; third, with the balance, to make up the pastor's salary if needed. *Held,* the first two gifts were void as a perpetuity, the third was a valid charity, but the whole was void for uncertainty. *Van Syckel* v. *Johnson* (N. J. 1908) 70 Atl. 657.

A gift in trust for keeping up a family burial lot, not being a charity, is void as a perpetuity. *Rikard* v. *Robson* (1862) 31 Beav. 244. If a single fund is provided for several purposes, some of which are legal, and some illegal, the cases fall into two groups. (1) Where the fund is given partly for a purpose which fails and partly for a valid charitable purpose. If the amount required to satisfy the illegal purpose is reasonably ascertainable, two funds are in effect created and the gift to the charity is good; *Hoare* v. *Osborne* (1886) L. R. 1 Eq. 585; if that amount is not ascertainable the gift to the charity fails for uncertainty. *Limbrey* v. *Gurr* (1819) 6 Madd. 151. (2) Where the residue remaining after satisfying an invalid purpose is given to a charity. The English decisions treat this case as a gift to the charity subject to an invalid gift which fails, and the whole goes to the charity. *Dawson* v. *Small* (1868) L. R. 18 Eq. 114. This is very questionable as a fixed rule, but is well settled. *In re Birkett* (1878) 9 Ch. Div. 576. Further it is held that a gift to keep in repair a churchyard is good as a charity, and that a gift to keep in repair a family vault is ascertainable in amount. *In re Vaughan* (1886) L. R. 33 Ch. 187. Therefore in the English courts the gift for the family lot would have fallen into the residue for the pastor's salary, as would any surplus after keeping the churchyard in repair. In New Jersey the first gift could only have been good if made to a cemetery association, *Moore's Exrs.* v. *Moore* (1892) 50 N. J. Eq. 554, but it would have been more just to sustain the second gift on the reasoning of the English cases. Assuming, as the court did, that both gifts were void, the English construction would have made the entire fund available for the pastor's salary, a result less in accord with the testator's intention than that reached in the principal case.

TRUSTS—SIMPLE TRUST—RIGHT OF CESTUI TO TERMINATE.—A testator bequeathed his estate to trustees to pay one-third of the income to his widow and that of one-fourth of the remainder to a son. Further the son was to be paid one-fifth of his share of the principal upon arriving at 21, three-fifths in the discretion of the trustees at 28, while the remaining one-fifth was to be held in trust. The son assigned the latter four-fifths and the assignee seeks a transfer. *Held,* since the son was not entitled, the assignee could not terminate the trust. *Ballantine* v. *Ballantine* (C. C. A. 1908) 160 Fed. 927, aff. 152 Fed. 775.

The trustee exists for the benefit of the *cestui* and must convey the *res* when and to whom the *cestui,* entitled thereto, directs. [*Watts* v. *Turner* (Eng. 1830) 1 R. & M. 634; *Whall* v. *Converse* (1888) 146 Mass. 345.] The *cestui* may terminate the trust not only when its objects have been fulfilled: [*Dodson* v. *Ball* (1869) 60 Pa. 492]: but also when he is the sole beneficiary, [*Re Brown's Will* (1859) 27 Beav. 324; cf. *Harbin* v. *Masterman* (1894) 2 Ch. 184], or when all the beneficiaries consent, [*Eake* v. *Ingram* (1904) 142 Cal. 15]—though the trustee has active duties, [*Culbertson's Appeal* (1874) 76 Pa. 145], provided that the *cestui* or *cestuis* are *sui juris* [*Saunders* v. *Vautier* (1841) 4 Beav. 115], that no discretion is reposed in the trustee, [*Cooper* v. *Cooper* (1882) 36 N. J. Eq. 121], and that the *cestui's* interest is absolute. [*Nichols* v. *Eaton* (1875) 91 U. S. 716; cf. *Franz* v. *Race* (1903) 205 Pa. 150.] The requirement in Massachusetts that any expression of intention by the testator limiting the beneficiary's interest is valid, *Claflin* v. *Claflin* (1889) 149 Mass. 19; *Young* v. *Snow* (1897) 167 Mass. 287, is contrary to the earlier decisions, *Sears* v. *Choate* (1888) 146 Mass. 395, and is an unwarranted extension of the reason-

ing adopted to support "spendthrift" trusts. Cf. *Ghormley* v. *Smith* (1891) 139 Pa. 584; *Nichols* v. *Eaton, supra.* Clearly then, since the payment of the three-fifths was discretionary in the trustees, the son was not absolutely entitled. While the gift of the remaining one-fifth might have been regarded as a trust separate from the other bequests, cf. *Vanderpoel* v. *Loew* (1889) 112 N. Y. 167, thus entitling the son to the *res* as the sole beneficiary, the contrary construction of the testator's intent, adopted by the court, seems preferable, especially since under the former view the will was maintainable. Cf. *Vanderpoel* v. *Loew, supra,* 177. Accordingly the principal case is correct.

TRUSTS—"SPENDTHRIFT" TRUSTS.—A testator bequeathed property to trustees to pay the income to the *cestui's* personal use free from the claims of creditors. The *cestui* sought to have the trust terminated. *Held,* the petition was dismissed since the will created a "spendthrift" trust. *Van Leer* v. *Van Leer* (Pa. 1908) 70 Atl. 716.

The *cestui* should be entitled to terminate the trust unless his interest is limited by the "spendthrift" clause. The authorities agree that his interest is limited if it is to terminate upon the happening of a condition subsequent, *Nichols* v. *Eaton* (1875) 91 U. S. 716, or if the trustee is "to apply" rather than "to pay" the income. *In re Bullock* (1891) 60 L. J. Ch. 341. But where the settlor creates an estate in the *cestui* and then attaches the limitation that it shall be free from the claims of creditors, one line of cases holds the limitation repugnant to the gift and void. *Brandon* v. *Robinson* (1811) 18 Ves. 429; see Gray, Restraints on Alienation (2nd Ed) §258, while another line maintains that the settlor's intention qualifies the *cestui's* interest. *Broadway Nat'l Bank* v. *Adams* (1882) 133 Mass. 170; *Frantz* v. *Race* (1903) 205 Pa. 150. And see *Ghormley* v. *Smith* (1891) 139 Pa. 584. This latter view does not necessarily involve a negation of the maxim that equity follows the law. Cf. Pomeroy, Equity Jurisdiction §425. Equity has in at least one instance nullified a rule of property—in allowing the equity of redemption. Furthermore, the policy of the law is now broadening. Thus statutes provide for guardians of spendthrifts, Woerner, Guardianship § 114; cf. 1 Bl. Comm. 463, for exemptions of certain property, N. Y. Code of Civ. Proc. 1390 *et seq.,* and for "spendthrift" trusts to the extent necessary for the *cestui's* support. *Tolles* v. *Wood* (1885) 99 N. Y. 616. The rights of creditors cannot be used in argument against this view since the very act of giving credit implies the assumption of risk by the creditor. Furthermore in many cases the creditor is chargeable, under modern recording acts, with constructive notice. See *Nichols* v. *Eaton, supra,* at 725. It would seem, however, despite the persuasiveness of these arguments, that the fostering of a class—usually wealthy—who are legally protected in not paying their debts is contrary to a sound public policy.

WATER AND WATER COURSES—APPROPRIATIONS—INTERSTATE STREAMS.—An appropriator on an innavigable stream in Idaho sued an appropriator in Wyoming to have determined the question of priority. *Held,* the plaintiff was the senior appropriator, and defendant's diversions were enjoined. *Taylor* v. *Hulett* (Idaho 1908) 97 Pac. Rep. 37.

A riparian owner at common law had a right inherent in his riparian land to use the natural flow of the stream for reasonable uses, *Union Mill & Mining Co.* v. *Ferris* (1872) 2 Sawy. 176 at 194; and irrigation if conducted without damage to lower owners was such a use, *Farrell* v. *Richards* (1879) 30 N. J. Eq. 511; *Watkins Land Co.* v. *Clements* (1905) 98 Tex. 578, unless extended to non-riparian lands. *Gould* v. *Eaton* (1897) 117 Cal. 539. In many arid western states the common law rule does not apply. *Willey* v. *Decker* (1903) 11 Wyo. 496. There the first appropriator, on grounds of public policy, acquires a right not inherent in, but appurtenant to his lands, *Lower Kings etc. Co.* v. *Kings River etc. Co.* (1882) 60 Cal. 408; *Rickey etc. Co.* v. *Miller & Lux* (1907) 152 Fed. 11, whether riparian or non-riparian. *Hammond* v. *Rose* (1888) 11 Colo. 524. Further, the extent of subsequent use is determined by the original claim. *Lobdell* v. *Simpson* (1866) 2 Nev. 274; *Butte C. & D. Co.* v. *Vaughn* (1858) 11 Cal. 143, the priority of which

establishes the right even as against subsequent appropriators in other states. *Morris* v. *Bean* (1903) 123 Fed. 618. The rule of priority extends to interstate disputants because the acquisitions are under the statutes of the Federal government, which originally owned the entire region. *Howell* v. *Johnson* (1898) 89 Fed. 556. And a diversion infringing an appropriation is actionable either in the jurisdiction where the act was committed or where the injury was effectuated. *Manville Co.* v. *Worcester* (1884) 138 Mass. 89; *Bulwer's Case* (1583) 7 Coke 1. Accordingly the principal case is sound.

BOOK REVIEWS.

ROBERT W. SKINNER, JR., *Editor-in-Charge.*

THE LAW OF TORTS. By SIR FREDERICK POLLOCK. Eighth Edition. London: Stevens & Sons, Ltd. 1908. pp xl, 695.

During the four years which have passed since the appearance of the seventh edition of this standard work, the Law of Torts has not expanded or changed to any marked extent through judicial decisions. In Britain, however, it has been seriously affected in one or two respects by statutes. Apparently, the passage of The Trade Disputes Act of December 21st, 1906, afforded the special inducement to the publication of the present edition. This statute is reprinted as Appendix B, and is referred to frequently by the author. While he is careful to say that "it is not within a text writer's province to comment on the policy of the Statute" (p. 96), he does not hesitate to call it a "violent empirical operation on the body politic," and to utter the lament that Englishmen must hereafter "look to jurisdictions beyond the seas for the further judicial consideration of the problems which English Courts were endeavoring to work out on principles of legal justice." (p. V.) Possibly, it may be some consolation to the learned author to know, that at least one of the "jurisdictions beyond the seas" preceded the mother country in this empirical legislation (Chap. 235, Laws of Cal. 1903).

Another Statute which noticeably changes existing law is The Railway Fires Act of 1905, which went into effect with the opening of the present year. (p. 495.)

If instead of comparing the present edition with its immediate predecessor, we compare it with the first edition, we shall discover that this treatise has undergone a considerable modification. Not only has the substance of important decisions appearing during this period of twenty-two years been added to the text, but parts have been entirely rewritten: and in some instances, judicial deliverances have necessitated a radical change of statement of doctrine.

The opening chapter, on "The Nature of Tort in General," affords an excellent example of the thoroughness with which this work has been revised. No one can compare its present contents with those in the first edition, without being impressed by the author's careful and continued study of the subject, as well as by his determination to express his matured views in the most lucid and persuasive form.

The chapter on "Defamation" also bears witness to the learned author's habit of keeping abreast of the latest judicial decisions, and of modifying his text so as to bring it into accordance with them. This is especially noticeable in his discussion of the topic of "fair comment." His notes show too that he is familiar with the latest text books and magazine articles on Torts in America.*

The title of Chapter VIII has been changed from "Wrongs of Fraud and Malice," to "Wrongs of Fraud, Bad Faith, and Oppression." This

*On page 241, note F, he refers to articles in the third and fourth volumes of the COLUMBIA LAW REVIEW. On page 259 and frequently thereafter, he cites American text books on Torts.

change was made largely because of the misleading character of the term "malice," as shown by *Allen* v. *Flood* [1898] A. C. 1, and later cases. Under the head of "Deceit," much additional matter will be found resulting from the discussion incident to *Derry* v. *Peek* [1889] 14 A. C. 337, and the decisions which have applied its doctrine. Sir Frederick Pollock here repeats the view, which he expressed soon after *Derry* v. *Peek* was decided, that the decision is an unfortunate one; but he no longer contends that American judicial opinion accords with his own. In fact the doctrine of *Derry* v. *Peek* had been accepted by many of our courts and was generally considered the better view, before the House of Lords decided that case.

Another topic upon which our courts have led and still lead those of Britain, is that of Unfair Competition. Sir Frederick tells us that this term "is little known as yet in English courts" (p. 313), and the topic is coupled with that of Slander of Title in his treatise while comparatively few English cases are referred to. Indeed the principles governing this topic are viewed by our author as still involved in much uncertainty; and, probably they are, in England. Such is not the case, however, in this country, where the topic has been a prolific source of litigation during the last decade.

The subjects of conspiracy, and of tort liability for procuring breach of contract are discussed with much greater fulness in this edition, than in the first; and the latest English decisions are carefully digested and commented upon. However, notwithstanding the increased number of citations and the many changes in the text, this treatise has lost none of the fine literary quality which has secured for every preceding edition a warm welcome both from the practicing lawyer and from the non-professional student of legal topics.

MINING, MINERAL AND GEOLOGICAL LAW. By CHARLES H. SHAMEL. New York: Hill Publishing Co. 1907. pp. xxiii, 627.

The author in his preface expresses the belief that a concise exposition of the law and statutes that govern mining rights is opportune. Then he states, and truly, that this is "the only treatise written from the double standpoint of science and law." The geological chapters of the book concern a subject which a lawyer is incapable of criticizing, but the combination of these two views of mining rights clearly justifies the publication of a work which has added little from the legal standpoint not already found in Morrison and in Lindley. The importance of the subject, however, and the originality of the work justify an analysis.

In the early chapters the author points out the importance of the subject in both of its aspects, expounds geological definitions, limiting himself to "legal geology." He then discusses the subject of property in minerals and the legal definition of "mineral," "ore," etc., from the viewpoint of the common law and of State and Federal legislation. The fifth chapter is extremely interesting and alone would justify the publication of the work. In it the various theories past and present of ore formation are discussed. The next two chapters treat of the transition of local rules and customs into law.

In treating of the procedure necessary to acquire mining rights, the author covers substantially the same ground as Morrison and Lindley, with both of whom he agrees, contrary to Snyder, that to allow a relocation by one who had lost his claim by abandonment would open the door to fraud. It would seem on principle that fraud is really but a question of fact, of which such a relocation might be some, but not necessarily conclusive, evidence. In discussing the effect of a patent (p. 131) no mention is made of the fact that a patent is conclusive evidence, only that all steps antecedent to its issuance were validly taken and that it does not conclude the rights of parties appearing in the chain of title. The statement on the same page with regard to coal lands, that the Statute and the Land Office rules give the procedure so fully that "any further discussion * * * is unnecessary" seems to one experienced in handling coal cases to be somewhat extravagant.

After considering the different uses of the term "vein" and showing that the legal use is much broader than the scientific one, the author leads up to his discussion of extralateral rights by defining "apex," "strike," "dip," etc. The two chapters (13 and 14) devoted to this subject are from a legal standpoint the most valuable in the book. The author fully discusses the doctrine of extralateral rights and summarizes his discussion by laying down a series of rules, covering the various situations that have arisen in the cases, which, by judicial expression, have now become settled law. The author suggests (p. 213) that where an original vein begins and ends within a plane and is parallel to the end lines of the plane, the rule would probably be the same as for a secondary vein in the same situation; that is, the end lines would determine dip rights. It would seem that a more logical sequence from the established rule would be to draw planes through the termination of the vein parallel to the side lines and to determine the extralateral rights by these planes. The reason preventing the application of this principle in the case of secondary veins is that the courts have refused to recognize two sets of end-line planes for the same claim.

The author's discussion of "Tunnels" (Ch. 15) is very satisfactory, and is especially clear as to the extent of a tunnel locator's rights. The author apparently disagrees (p. 255) with Mr. George D. Emery, who contributes Chapter XXII, as to the necessity for a tunnel locator to adverse a lode applicant for patent for a lode lying across the line of the tunnel. He says: "The statute only calls for adverse proceedings where one mineral claimant contests the right of another mineral claimant," citing *Creede, etc., M. Co.* v. *Uinta, etc., M. Co.* (1905) 196 U. S. 337; while Mr. Emery says (p. 352): "The locator of a tunnel claim must protect his rights by filing an adverse claim against an applicant for a patent for a lode lying across his line." An examination of the case cited by the author shows that his position is the correct one, though the rule, as laid down by him should be qualified to the extent that, where the lode claimant applies for patent to a location embracing a lode previously discovered in the tunnel, the tunnel claimant must adverse to protect his rights to such lode.

The author adds greatly to the interest of his book by a discussion of the question "should the extralateral feature of the Mining Law be repealed" (Ch. 16). His conclusion is that the present scientific development

of mining ideas is in accord with the extralateral rule, and that for geological reasons the law should not be repealed. It must be admitted that he sustains his position by very logical argument. However, it is still an open question whether this most fruitful source of litigation in mining enterprises is not a detriment and drawback rather than an aid to progressive mining development. Were veins regular and their boundaries both on strike and dip easily defined, his position would appeal more to the practical miner. The existence, however, in every apex suit of questions of fact that are almost impossible of certain solution leads the practical miner to prefer the old common law side-line rule, where the rights of all are clearly defined. In Nevada, to-day, where the congestion in the courts has delayed the decision of a multitude of apex suits many districts have voluntarily established the old law in settlement of their disputes.

The balance of the book is taken up with a discussion of placers (Ch. 17); water (Ch. 18); two parenthetical chapters (19 and 20) on the use of geology in law and industry; forms and procedure for locating mining claims (Ch. 21); and procedure to obtain patent (Ch. 22). The last two chapters are written by Mr. George D. Emery who, in addition to his disagreement with the author as to the necessity of adversing by a tunnel locator, further disagrees (p. 331) as to the width of a tunnel claim. Of the above chapters that on the subject of water gives one the impression of hasty preparation without much regard for fundamental principle.

While the appendix contains much valuable matter, it is unjustifiably long since mining statutes are not passed once for all. Accordingly one could not rely on such a digest of them as is here presented. On the other hand the pages on scientific bibliography are extremely valuable in that they point out the marked points of similarity and dissimilarity between the various state laws with accurate reference to the authorized publications. The closing pages on classification of rocks and geological formations are also valuable.

The convenient form and arrangement of the book together with its novel combination of the scientific with the legal aspect of the subject make it a real addition to the literature on Mining Law.

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